

The Constitutionally Inspired Approaches to Police Accountability for Violence Against Women in the U.S. and South Africa: Conservation versus Transformation

CHRISTOPHER J. ROEDERER*

ABSTRACT

In the summer of 2005, the United States Supreme Court in *Castle Rock v. Gonzales* and the South African Constitutional Court in *N.K. v. Minister of Safety & Security* overturned decisions from their appellate courts. *N.K.* drew on the Constitutional Court decision in *Carmichele v. Minister of Safety & Security*. All three were torts cases involving the duties of the police, their accountability to the public, and rights of women to be free from violence, and each depended on the respective court's interpretation of its constitution for resolution.

This article focuses on the comparison, or rather, the sharp contrast between, the values and spirit animating these decisions. The respective courts' interpretations of the underlying values or spirit of their constitutions either help forge a special relationship between victims and the police, thereby altering the existing distribution of entitlement and duties, or they hinder those attempts. The contrast is between a Court that views its Constitution as a progressive covenant between the people and its government, which fosters a culture of justification and accountability, and a Court that views its Constitution as a charter of negative liberties, and which will go to great lengths to conserve the status quo distribution of rights and entitlements. One is intent on protecting the vulnerable members of its society and the other is skeptical of attempts by the legislature to do so through the creation of new rights and the imposition of new duties on the police.

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* Associate Professor of Law, Florida Coastal School of Law; Senior Research Fellow, University of the Witwatersrand School of Law. The author thanks Amanda Jack and Charlene Poblette for their most able research assistance and Ericka Curran, Brian Foley, Susan Harthill, , Thomas Hornsby, Darren Latham, Julia McLaughlin, and Nicola Sharpe for helpful comments on earlier drafts of this work.

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“[Wherever] I owe allegiance to my country, there it owes me protection, and wherever my Government owes me no protection I owe it no allegiance and can commit no treason.”

-- Representative Broomall, *Cong. Globe*, 39th Cong., 1st Sess. 1263 (1866)

I. INTRODUCTION

In this last term, the highest courts in the U.S. and South Africa, respectively, the United States Supreme Court in *Castle Rock v. Gonzales*¹ and the South African Constitutional Court in *N.K. v. Minister of Safety & Security*,² overturned decisions from their appellate courts, the Tenth Circuit,³ and the Supreme Court of Appeals.⁴ *Castle Rock* involved the failure of the police to enforce a restraining order under a “mandatory enforcement” statute resulting in the death of Ms. Gonzales’s three daughters, while *N.K.* involved the rape of a stranded woman by three on-duty uniformed police officers who offered to give her a ride home. The main legal issues in these cases are not directly on point, for in *Castle Rock* the question was whether Ms. Gonzales could establish that she had a property right in the enforcement of the restraining order that was worthy of Fourteenth Amendment Due Process protection, while the question in *N.K.* was whether the Police Services and the Minister of Safety and Security could be held vicariously liable for the

¹ 125 S. Ct. 2796 (2005).

² CCT 52/04 (CC Jun. 13, 2005), at <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT52-04> (last visited Aug. 30, 2005).

³ *Gonzales v. Castle Rock*, 366 F.3d 1093 (10th Cir. 2004).

⁴ *K. v. Minister of Safety & Sec.*, 2005 (3) SA 179 (SCA), available at <http://wwwserver.law.wits.ac.za/sca/files/45603/45603.pdf> (last visited Sept. 1, 2005).

gross dereliction of duty on the part of the officers. Both cases, however, address the important issue of the duties of the police, their accountability to the public, and rights of women to be free from violence, and/or to be protected from violence by the police.

N.K. drew on another very important South African constitutional judgment, the case of *Carmichele v. Minister of Safety & Security*,⁵ which, like *Castle Rock*, was a case heard on exception. *Carmichele*'s facts are perhaps more directly on point, as they involved the failure of the police and prosecution to act on behalf of the plaintiff to put evidence before the Court to oppose the bail of a dangerous sexual offender, despite numerous pleas by concerned parties, resulting in a vicious attack by the offender on Ms. Carmichele. Here, *Castle Rock* and *Carmichele* share an important doctrinal issue, the question of whether the duties in question can give rise to a right of the plaintiff to expect the police to come to her aid. Both cases addressed the issue of the general duty rule and the exception to that rule, which is created when a special relationship is established between the plaintiff or her class and the police.⁶ All three cases are torts cases (or the South African counterpart, namely, delict cases) that depend on the courts' respective interpretations of their constitutions to determine if the plaintiff would be afforded a remedy.

This article is not primarily concerned with a comparison of the doctrinal nuances of these sets of cases, or of the respective constitutional mechanisms that aided the courts in coming

⁵ 2001 (4) SA 938 (CC) [hereinafter *Carmichele*, CC] (applying the Constitution to find that a legal duty may have existed on the police and prosecutor and that they may have breached that duty when they recommended the release without bail of a Mr. Coetzee without placing before the magistrate any information regarding Coetzee's previous convictions and history of sexual violence where Mr. Coetzee subsequently violently attacked the plaintiff), available at <http://concourt.law.wits.ac.za/files/carmichele/carmichele.pdf> (last visited Sept. 1, 2005), remanded to 2003 (2) SA 656 (C) (Chetty, J.) (finding that the police and prosecution owed the plaintiff a legal duty and had failed in carrying out the duty).

⁶ See *infra* Part II, at subsection titled "Forging a special relationship" for further discussion of the rule.

to their decisions.⁷ The point is the comparison, or rather, the sharp contrast between the values and spirit animating these decisions. The respective courts' interpretations of the underlying values or spirit of their constitutions either help forge a special relationship between victims and the police, thereby altering the existing distribution of entitlement and duties, or they hinder those attempts. The contrast is between a Court that views its Constitution as a progressive covenant between the people and its government, which fosters a culture of justification and accountability, and a Court that views its Constitution as a charter of negative liberties, and which will go to great lengths to conserve the status quo distribution of rights and entitlements.⁸ One is intent on protecting the vulnerable members of its society and the other is skeptical of attempts by the legislature to do so through the creation of new rights.

Part I provides a brief summary of the Supreme Court decision in *Castle Rock*, highlighting the fact that the Supreme Court went to considerable lengths to undermine the plaintiff's entitlement to the mandatory enforcement of the restraining order, an entitlement that she was granted under both state legislation and the court order itself. The Supreme Court came to this result by concluding: that contrary to its plain meaning, the statute could not be interpreted as providing mandatory enforcement and instead gave police discretion in deciding whether to arrest a violator of a restraining order; that the Court need not certify the question of the statute's interpretation to the Colorado Supreme Court; that the Court need not defer to the

⁷ On one level, these opinions draw on very different constitutional mechanisms for their resolution. The *Castle Rock* decision is based on the Court's interpretation of "property" under the Due Process clause of the Fourteenth Amendment, while the South African cases rely on provisions of the South African Constitution, which require that every development of the common law be in compliance with the spirit, purport and objects of the Bill of Rights. Section 39 of Act 104 of 1994 (Act 104 of 1994 referred to as "Final Constitution"). On another level, it will be argued that Justice Scalia's majority opinion in *Castle Rock* also draws on what he holds to be the spirit of the U.S. Constitution, although he is less explicit in doing so.

⁸ The Court here privileges this *laissez faire* view of the Constitution in spite of Justice Holmes's claim in his dissent in *Lochner v. New York* that "... a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*." 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

circuit court decision in the case, notwithstanding a general policy and precedent that it do so in issues of state law; and that, notwithstanding the specific requirements and purposes of the statute, Ms. Gonzales and other Colorado residents had no right to anything other than the general protections of law enforcement accorded to all residents. The Court goes so far as to hold that it is virtually impossible for a state to create legislation that can forge a relationship between the police and those with restraining orders that is special enough to rise to the level of a property right for the purposes of procedural due process protection.⁹

The Supreme Court decision was not mandated by the text of the Constitution or the text of the Colorado legislation. Neither was it mandated by the respective drafting history or purposes of the texts. The Supreme Court made a choice to reach down into the Colorado legislation and interpret it in such a way as to defeat Ms. Gonzales's property right and in turn her Fourteenth Amendment Due Process right. The Court's main argument throughout was that in spite of the plain language, history and purpose of the legislation, the police still had discretion under the statute. In effect, the Court ignored the actual Colorado legislation and found, almost as a matter of constitutional law, that the police have discretion to arbitrarily ignore restraining orders. The Court nowhere articulates a principled justification for doing so. The largely,

⁹ This is similar to the Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), which denied standing to plaintiff's suing under the Endangered Species Act challenging a regulation providing that the United States would not comply with the Act outside of the United States. The Act provided for civil suits to enjoin the United States for violation of the Act (16 U.S.C. § 1540(g)). Nonetheless, Justice Scalia, writing for the majority, held that Congress cannot authorize standing for generalized grievances, as the prohibition is based on Article III rather than prudential grounds, as had been held in *Warth v. Seldin*, 422 U.S. 490, 499 (1975). This, in effect, precludes Congress from creating or expanding justiciable rights to the preservation of endangered species or to create other rights based on generalized harms to the public. See Cass Sunstein, *What's Standing After Lujan? Of Citizen Suits, 'Injuries,' and Article III*, 91 MICH. L. REV. 163 (1992). As will be demonstrated below, the right in question in *Castle Rock* is not of this broad nature, but is for a specific person under specific conditions. Nonetheless, the result is similar in that the Court is taking it upon itself to thwart the decision of the elected branches to create or extend the rights of the people and to impose duties on the state. The result is less accountability of the executive branch.

although not completely,¹⁰ unarticulated principle underlying the decision is that the underlying property claim was new, and if recognized, it would alter the existing common law distribution of entitlements and duties. It would provide those with restraining orders (primarily women) with a right to enforcement, would require that police officers execute their duties, and would hold municipalities liable when those rights were denied without due process of law.

Part II will shift to another world, both geographically and legally, and will address the decision of the South African Constitutional Court in *Carmichele*. In contrast to the decision in *Castle Rock*, the Court in *Carmichele* is explicit that it is reading purposefully the Constitution and the relevant legislation in question to further the values of Constitution. Unlike in *Castle Rock*, the Court does not decide the final issue, but remands the case to the trial court to hear the case on the merits. The South African Constitutional Court distinguishes its approach from the negative liberties approach of the U.S. by noting that the South African Constitution's provisions point towards a positive duty to prevent harm.¹¹ Finally, unlike the Court in *Castle Rock*, the Court in *Carmichele* took into consideration the historically vulnerable place of women within South African society and South Africa's international obligations in interpreting both the duties of the state and the rights of the plaintiff in the case. These factors combined with the facts of the case to forge the special relationship required to impose a duty on the defendants and to establish the legally enforceable rights of the plaintiff.

¹⁰ There is evidence in the judgment of this premise, e.g. when Justice Scalia writes, "The creation of a personal entitlement to something as vague and novel as enforcement of restraining orders cannot 'simply go without saying'Such a right would not, of course, resemble any traditional conception of property." 125 S. Ct. 2796, 2809 (2005).

¹¹ Note, however, that the provisions of the South African Constitution and the South African Police Act are not as specific as the Colorado legislation and restraining order in *Castle Rock* that created the purported property entitlement for that specific plaintiff. Compare *infra* notes 21-22 and accompanying text with note 136 and accompanying text. Neither is the South African Constitution as clear as the Fourteenth Amendment Due Process clause, along with the § 1983 federal legislation, giving the plaintiff in *Castle Rock* the cause of action. Compare *infra* note 12 with note 136 and accompanying text.

Part III continues with a similar approach to the duties of the police and the rights of victims, although in the context of vicarious liability. The case of *N.K.* explicitly draws on the decision of the Constitutional Court in *Carmichele*, but it also brings out the contrast between a conservative, libertarian approach to vicarious liability, which favors minimal responsibility of employers, including the state, for the conduct of employees, and the constitutionally inspired approach, which favors the safety of the public and accountability of employers and the state, for the risks and harms they impose on the public. *N.K.*, like *Carmichele*, and unlike *Castle Rock*, fosters a culture of public accountability and a culture of protecting the rights of some of the most vulnerable members of its society. On almost every conceivable view of democracy the South African decisions and approach are better than the decision and approach taken in *Castle Rock*.

II. *CASTLE ROCK*

A. *Introduction*

Ms. Gonzales sued the City of Castle Rock under 24 U.S.C. § 1983 and the Fourteenth Amendment procedural due process clause.¹² Her claim was that “...she had a property interest in police enforcement of the restraining order against her husband, and that the town deprived her of this property without due process by having a policy that tolerated non-enforcement of

¹² 125 S. Ct. 2796 (2005). As the Court explained:

The Fourteenth Amendment to the United States Constitution provides that a State shall not “deprive any person of life, liberty, or property, without due process of law.” Amdt. 14, § 1. In 42 U.S.C. § 1983, Congress has created a federal cause of action for “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”

Id. at 2802-03.

restraining orders.”¹³ The alleged facts, which, given that the case was heard on exception, were required to be accepted as true by the Court, were that “her deprivation was not the result of random and unauthorized behavior by the individual officers. Rather, . . . the deprivation was the result of a custom and policy of the City of Castle Rock not to enforce domestic abuse protective orders.”¹⁴ Her claim was one of reckless disregard for her right to police protection,¹⁵ which took place “... when its police officers... failed to respond properly to her repeated reports that her estranged husband was violating the terms of a restraining order.”¹⁶ This failure by the police resulted in her estranged husband killing their three daughters and driving with their bodies in the cab of his pickup truck to the police station where he open fired on the police, who returned fire, killing him.¹⁷

Her claim to a property right was based on the Colorado legislation combined with the actual restraining order. In 1994 Colorado joined a wave of states that enacted legislation to address this very problem:¹⁸ the problem of death and injury to victims of domestic violence caused in part by the custom of police to avoid the enforcement of restraining orders.¹⁹ The

¹³ *Castle Rock*, 125 S. Ct. at 2803. As the circuit court noted, “Indeed, the process would only take minutes to perform, and includes tasks officers regularly perform in the course of their daily duties.” *Gonzales v. Castle Rock*, 366 F.3d 1093, 1116 (10th Cir. 2004).

¹⁴ *Gonzales*, 366 F.3d at 1112-13.

¹⁵ *Id.* at 1113 (quoting Aplt. Appx. at 12).

¹⁶ *Castle Rock*, 125 S. Ct. at 2800.

¹⁷ *Id.* at 2802. Justice Scalia, writing for the majority, begins the opinion by acknowledging the horrible facts in the case. *Id.* at 2800.

¹⁸ Justice Stevens notes that nineteen states mandate arrest for domestic restraining order violations. *Castle Rock*, 125 S. Ct. at 2818 (Stevens, J., dissenting). G. Kristian Miccio puts the number at twenty-nine in *A House Divided: Mandatory Arrest, Domestic Violence and the Conservatization of the Battered Women’s Movement*, 42 HOUS. L. REV. 237 n.2 (2005). I would add six other jurisdictions to her list, for a total of thirty-five U.S. states and territories. See Christopher Roederer, *Another Case in Lochner’s Legacy, the Court’s Assault on New Property: The Right to the Mandatory Enforcement of a Restraining Order is “a Sham, Nullity and Cruel Deception,”* Appendix A (forthcoming [note I presently have two offers to publish this article and will make a final determination by the 9th of September]).

¹⁹ One of the most important factors leading to the development of mandatory arrest laws has been the consistent dismissive attitude that police have displayed toward domestic violence. Marion Wanless, *Mandatory Arrest: A Step Toward Eradication of Domestic Violence But is it Enough?*, 1996 U. ILL. L. REV. 533, 542 (1996). Almost every state now allows police officers to make an arrest without a warrant when the officer has probable cause to believe that domestic violence has occurred. *Id.* at 542. “However, police officers have made little use of their

Colorado General Assembly passed legislation targeting domestic violence in general,²⁰ and the mandatory enforcement of restraining orders in particular. Section 18-6-803.5. of the Colorado Revised Statutes Annotated (“Crime of violation of a protection order--penalty--peace officers' duties”) states, “... A peace officer shall use every reasonable means to enforce a protection order,”²¹ and further clarifies the duty by stating:

A peace officer *shall arrest*, or, if an arrest would be impractical under the circumstances, *seek a warrant for the arrest* of a restrained person when the peace officer has information amounting to probable cause that:

- (I) The restrained person has violated or attempted to violate any provision of a protection order; and
- (II) The restrained person has been properly served with a copy of the protection order or the restrained person has received actual notice of the existence and substance of such order.²²

The statute not only identifies the police as having a duty to enforce the protection order, but also identifies the beneficiary of the order. Subsection (1)(a) identifies the “protected person” as “...the person or persons identified in the protection order as the person or persons for whose benefit the protection order was issued.”

After briefly addressing the “special relationship” created by the statute and Ms. Gonzales’s “new property” right, this section will address the Court’s flawed approach to the case and then the Court’s flawed arguments in the case. Had the case of *Castle Rock* been approached according to accepted canons of statutory construction and precedent, it either would

expanded arrest power ... even when probable cause is clearly present, police officers frequently try to calm the parties and act as mediators.” *Id.* Further, Wanless refers to three studies that have shown that arrest records are very poor when there are no policies or laws mandating arrest. *Id.* These studies found that when the decision was left to the police the arrest rate ranged between three percent and ten percent. *Id.* In one of the studies police made arrests in only thirteen percent of the cases where the victim had visible injuries and in only fourteen percent of the cases where the victim requested an arrest. *Id.* at 542-43. Another study put the latter figure at thirty-nine percent. *Id.* at 543. The more fundamental reason for the laws is the tragic numbers of deaths and injuries to women and children (see, e.g., The American Bar Association Commission on Domestic Violence statistics on women and children, at <http://www.abanet.org/domviol/stats.html> (last visited Aug. 14, 2005)), which were due in part to the ineffectiveness of prior forms of intervention and to the dismissive attitudes of the police. Wanless, *supra*, at 540-42.

²⁰ See *Castle Rock*, 125 S. Ct. at 2817 (Stevens, J., dissenting).

²¹ COLO. REV. STAT. ANN. § 18-6-803.5(3)(a) (LEXIS through 2004 Supplement (2004 Sess.)).

²² *Id.* at § 18-6-803.5(3)(b) (emphasis added).

have been certified to the Colorado Supreme Court for a determination of the issue of the state-based right, or it would have been remanded for a trial on the merits. Secondly, even if one accepts the Court's approach to the case, not certifying the question and not deferring to the circuit court's decision, the Supreme Court's arguments defeating Ms. Gonzales's claims are seriously flawed. The decision can only be justified by a strong presumption against the ability of states to create new property rights that will be protected against arbitrary deprivation under the Fourteenth Amendment Due Process clause.

1) Forging a special relationship

In effect, the Colorado General Assembly forged a "special relationship" between the police and those who have obtained restraining orders, creating duties on the police to enforce restraining orders, and the right or entitlement of those who have obtained orders to have them enforced. This altered the common law distribution of entitlements and duties, for under the common law the police have no duty to come to one's aid unless there is this "special relationship."²³ The public duty rule works to defeat claims by specific individuals absent a "special relationship" establishing a specific duty to the plaintiff or her class.²⁴ Traditionally, "special relationships" are limited to those cases in which the police have committed to taking action on behalf of the particular plaintiff,²⁵ or those in her class,²⁶ or when a statute imposes a

²³ See, e.g., Licia A. Esposito Eaton, Annotation, *Liability of Municipality or Other Governmental Unit for Failure to Provide Police Protection from Crime*, 90 A.L.R. 5th 273 (2001); RESTATEMENT (SECOND) OF TORTS §§ 314A, 323 (1965).

²⁴ The public duty doctrine extends beyond police duties to all public entities. Exceptions can be found when the conduct in question is not merely negligent but reckless, intentional or egregious, or when the entity induces reliance by the plaintiff, stands in a special relationship to either the wrongdoer or the victim, and when the entity is guilty of a misfeasance (negligent action), rather than a nonfeasance (negligent omission). See DAN DOBBS, *THE LAW OF TORTS* § 271, at 723-27 (2000). Dobbs refers to recent case law in a few states that have rejected the public duty doctrine, including Alaska, Arizona, Colorado, Florida, Louisiana, Massachusetts, Nebraska, New Mexico, Oregon, and Wisconsin. *Id.* at 725-26 n.23. In many of these cases the courts noted that the public duty rule was a form of immunity and thus should not survive when immunity has been abrogated. *Id.*

²⁵ "...[W]hen the State, through its agents, voluntarily assumes a protective duty toward a particular member of the public, and undertakes action on behalf of that individual, reliance is induced and the State is held to the same standard of care as a private person or organization." *Williams v. State*, 664 P.2d 137, 140 (Cal. 1983). See, e.g.,

specific duty on the entity for a particular class of persons.²⁷ This is what the Colorado legislation did. The legislation and the court order were designed to make it clear to the police that in addition to their general public duties that they have specific duties to a certain class of individuals covered by the legislation and to the particular person specified in the court order.²⁸ The idea was to forge a special relationship with a class of people that the police had wanted to avoid,²⁹ thus providing a right to enforcement and bringing an end to an era of arbitrary enforcement.

2) Ms. Gonzales's property right

Yet, last term the U.S. Supreme Court essentially rewrote the Colorado law and undid its protections by removing any prospect for a constitutional remedy for those directly harmed by police officers' arbitrary decision to violate the law by not enforcing restraining orders. The Supreme Court ruled that Ms. Gonzales could not state a claim for which relief could be granted

Morgan v. County of Yuba, 41 Cal. Rptr. 508 (Cal. Ct. App. 1964) (where police failed to keep their voluntary promise to inform plaintiff's wife of the release of a prisoner who had threatened to kill her and when released did kill her). The rule has been characterized as an application of the "good Samaritan" rule that attaches once one volunteers to assist. See Davidson v. City of Westminster, 649 P.2d 894, 900 (Cal. 1982). Note, however, that the argument for holding the police liable under such conditions is stronger given that they have a general duty to the public while the average citizen who volunteers aid does not.

²⁶ Florence v. Goldberg, 375 N.E.2d 763 (N.Y. 1978) (the police department voluntarily assumed the specific duty to guard a school crossing and without notice failed in that duty).

²⁷ DOBBS, *supra* note 24, at 724.

²⁸ *Gonzales*, 366 F.3d at 1104. The circuit court made the following remark about the conduct of the police in this case: "Their response, in other words, was a sham which rendered her property interest in the restraining order not only a nullity, but a cruel deception." *Id.* at 1117. As noted by the circuit court, the property right held by this particular plaintiff was not created by the abstract legislative process which brought the legislation into being, but by the order "issued by a court on behalf of a particular person and directed at specific individuals and the police." *Id.* at 1104.

²⁹ As Heather Melton states, "Historically, police response has been severely limited and confined to a policy under which officers ended up chronically distancing themselves from a task they felt did not belong under their jurisdiction." Heather C. Melton, *Police Response to Domestic Violence*, 29 J. OFFENDER REHABILITATION 1, 1 (1999), available at <http://www.crab.rutgers.edu/~goertzel/CJreadings/PoliceDomesticViolence.pdf> (last visited Aug. 18, 2005). The reasons for the avoidance include sexist views, the view that these are purely private matters, the resistance the police encounter from perpetrators and victims, the danger for the police responding to domestic calls, and the fact that the police they are often ill-equipped to mediate or counsel perpetrators and victims. See, e.g., Melton, *supra*, at 3. An influential study in Minneapolis indicated that arrests were more effective at addressing the problem. Melton, *supra*, at 2. Marion Wanless argues that mandatory arrest statutes aid the police as they take the domestic violence scenario out of the quasi police function of mediation and put it squarely into the arrest function, which police are better trained to perform and more comfortable performing. Wanless, *supra* note 19, at 547.

because she had no “property right” to have the court order enforced, notwithstanding that the legislature had required that such enforcement was mandatory in all cases. Thus, not only did the police arbitrarily deny her protection, The Supreme Court denied her the protection of the Fourteenth Amendment Due Process.³⁰

Although the property right in this case is not the typical right to have government not take one’s land, the distinction between rights and mere privileges was rejected in *Goldberg v. Kelly*,³¹ and this was solidified in *Roth v. Board of Regents*,³² where the Court stated, “the Court has fully and finally rejected the wooden distinction between ‘rights’ and ‘privileges’ that once seemed to govern the applicability of procedural due process rights.”³³ In *Roth* the Court basically set up two sides to the test. As to the first side, the Court stated:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.³⁴

³⁰ Note that the quote at the beginning of this article is from the House of Representative debates over the Civil Rights bill introduced in 1866, passed and vetoed by President Johnson and then overridden in that same year. See DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 423-54 (2d ed. 2005). The Civil Rights Act was the precursor to the Fourteenth Amendment. The argument put forward by representative Broomall included pointing out that it was “strange” that the government had the power to protect U.S. citizens abroad, but was powerless to protect them from the discriminatory denial of rights within the U.S. by the various states. See *id* at 430-31. If the government is unable or unwilling to protect its citizens, how can it ask for their allegiance?

³¹ 397 U.S. 254 (1970). As Charles R. Reich has commented about the case:

The question is: how much responsibility should the community take for the protection of the individual? The community must choose among three responses. It can deny social responsibility entirely. It can make economic protection of the individual a goal, but balance this goal against other goals which may be given an equal or higher priority. Or the community can make individual security an absolute right. *Goldberg v. Kelly* took the middle ground. It was a modest, moderate decision giving procedural protection to welfare recipients.

Charles R. Reich, *Beyond the New Property: An Ecological view of Due Process*, 56 BROOK. L. REV. 731, 731 (1990).

³² 408 U.S. 564 (1972).

³³ *Id.* at 571.

³⁴ *Id.* at 577.

The other side of the test is whether the State has created the entitlement, i.e., the existence of an entitlement is determined by an “independent source such as state law” and the “rules or understandings” that it creates.³⁵

The majority in *Castle Rock* began its analysis by quoting much of this language from *Roth*.³⁶ It did not spend any time on the first side of the question, most likely because the answer to it provides strong support for the existence of an entitlement. Rather, the Court turned to the second side of the test to determine if in fact the State had created such an entitlement.

But, before doing so, the Court addressed a few preliminary matters, which if dealt with properly should have resulted in the case either being remanded for a decision on the merits or being certified to the Colorado Supreme Court for a determination on the issue of the state-based property right. This did not take place, however, because the Court refused to certify the question to the Colorado Supreme Court so it could decide whether its “mandatory arrest” statute, along with the court order, create the state right or entitlement in issue; and finally, it refused to defer to the decision of the six judge panel of the Tenth Circuit, although deference is the general rule in cases involving state law questions.³⁷

B. The Court’s approach to the case

Although the Supreme Court made the central question in this case the state law question regarding the establishment of an entitlement in favor of Ms. Gonzales,³⁸ the majority of the

³⁵ *Id.* Charles Reich is generally credited with being the driving intellectual force behind the assault on the right privilege distinction and for the recognition of “new property” rights. See Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). Reich’s list of “new property” includes: income and benefits, jobs, occupational licenses, franchises, contracts, subsidies, public resources, and services, include postal service, police and fire services and education among others. *Id.* at 733-37. The issue of the property right in question is addressed *infra*, throughout Part III.

³⁶ *Castle Rock*, 125 S. Ct. at 2803.

³⁷ See *infra* notes 67-73 and accompanying text.

³⁸ Justice Scalia may be thinking that the real issue in the case is a federal issue when he concludes, near the end of his decision, that “[t]his result reflects our continuing reluctance to treat the Fourteenth Amendment as 'a font of tort

Supreme Court did not find it prudent to certify the question to the Colorado Supreme Court. Justice Stevens, in his dissent, put forth a strong array of arguments in favor of sua sponte certification of the question, including "...federal-state comity, constitutional avoidance, judicial efficiency, and the desire to settle correctly a recurring issue of state law."³⁹ The Court rejected the idea that it should certify the case on the basis that the parties did not desire to have the question certified.⁴⁰

Even if the Court did not find Justice Stevens's arguments persuasive, it still would have been the practice to defer to the circuit court's determination as to the matter of state law, absent a finding that the decision was "clearly wrong."⁴¹ The reasons for the rule of deference are based on both efficiency and local knowledge of law and practice.⁴² In response to Respondent's contention that the Supreme Court was obliged to give deference to the circuit court, Justice

law.' *Castle Rock*, 125 S. Ct. at 2810 (internal citations omitted). This is an indication of his hostility to the § 1983 legislation, which explicitly makes violation of the Fourteenth Amendment a font for tort law.

³⁹ *Id.* at 2816 n.6 (Stevens, J., dissenting); *see also id.* at 2815-16.

⁴⁰ *Id.* at 2804 n.4.

⁴¹ The Court in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), stated:

The Court has stated that it will defer to lower courts on state-law issues unless there is "plain" error, *Palmer v. Hoffman*, 318 U.S. 109, 118 (1943); the view of the lower court is "clearly wrong," *The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959); or the construction is "clearly erroneous," *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960), or "unreasonable," *Propper v. Clark*, 337 U.S. 472, 486-87 (1949). On occasion, then, the Court has refused to follow the views of a lower federal court on an issue of state law. In *Cole v. Richardson*, 405 U.S. 676, 683-84 (1972), *e. g.*, we refused to accept a three-judge District Court's construction of a single statutory word based on the dictionary definition of that language where more reliable indicia of the legislative intent were available.

Id. at 500 n.9.

⁴² As Stevens states:

[t]his policy is not only efficient, but it reflects "our belief that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective States." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500-501, 86 L. Ed. 2d 394, 105 S. Ct. 2794 (1985); *Hillsborough v. Cromwell*, 326 U.S. 620, 629-630, 90 L. Ed. 358, 66 S. Ct. 445 (1946) (endorsing "great deference to the views of the judges of those courts 'who are familiar with the intricacies and trends of local law and practice'"). *Leavitt v. Jane L.*, 518 U.S. 137, 145, 135 L. Ed. 2d 443, 116 S. Ct. 2068 (1996) (*per curiam*).

Castle Rock, 125 S. Ct. at 2814 (dissenting).

Scalia flippantly stated, “We will not, of course, defer to the Tenth Circuit on the ultimate issue.”⁴³ His reason is stated as follows:

We have said that a “presumption of deference [is] given the views of a federal court as to the law of a State within its jurisdiction.” *Phillips*, supra, at 167. That presumption can be overcome, however, see *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (per curiam), and we think deference inappropriate here. The Tenth Circuit’s opinion, ...did not draw upon a deep well of state-specific expertise, but consisted primarily of quoting language from the restraining order, the statutory text, and state-legislative hearing transcripts. See 366 F.3d, at 1103-1109.⁴⁴

This does not help the Court’s case, as the per curiam decision in *Leavitt* was based on the finding that the circuit court was clearly wrong in failing to give effect to the plain language of the statute.⁴⁵ As with the legislative history of the statute, the Court cannot find any support for the view that there is a more permissive standard than the “clearly wrong” standard. Further, the Court does not attempt to argue that the circuit court was clearly wrong, but merely states that “we think deference inappropriate here.”⁴⁶ The Court has both distorted the rule and misapplied it to the facts of the present case.

C. The Court’s substantive arguments designed to defeat the claim to a property right

Having thus strained to bring the matter under its purview, the Court turned its attention to systematically undermine the claim that Ms. Gonzales had a property entitlement in the enforcement of the restraining order. The Court argued that: the alleged mandatory arrest statute

⁴³ *Id.* at 2803.

⁴⁴ *Id.* at 2804.

⁴⁵ As the Court stated, “The Court of Appeals’ opinion not only did not regard the explicit language of § 317 as determinative -- it did not even use it as the point of departure for addressing the severability question.” 518 U.S. at 140. It went on to state, in the section cited by Justice Scalia in *Castle Rock*, 125 S. Ct. 2804, that the “... general presumption [of deference] is obviously inapplicable where the court of appeals’ state-law ruling is *plainly wrong*, a conclusion that the dissent does not even contest in this case.” *Id.* at 145 (emphasis added). In *Castle Rock*, it is Justice Scalia who is ignoring the explicit language of the statute, not the circuit court.

⁴⁶ See *supra* note 44 and accompanying text.

is not mandatory because it still allows for police discretion and thus it cannot give rise to an entitlement;⁴⁷ even if the statute was mandatory, it mandates one of two options: arrest or seek an arrest warrant, and since the second option is a procedure and not an end in itself, this cannot give rise to an entitlement;⁴⁸ even if the statute mandated a non-discretionary duty on the part of the police, it would still not follow that the intention was to provide the plaintiff a right or entitlement, rather than simply fulfilling a public end, as does much of the criminal law;⁴⁹ and even if it did establish an entitlement, it is not a property entitlement protected by the due process clause of the Fourteenth Amendment because it does not have monetary value and was an incidental benefit of a general duty.⁵⁰

The remainder of this section puts forward the arguments that: the plain language, history and purpose of the legislation all indicate that the statute mandates enforcement, and while there may be some amount of discretion, it is not of the sort that undermines the duty of enforcement; the options of arrest or seek an arrest warrant are not discretionary options and they are not merely procedures, but are ends that give rise to an entitlement; the statute serves both public and private ends and the history of the legislation and other similar legislation indicates that that the intention was to create a right or entitlement in the mandatory enforcement; and, because the entitlement was created by the democratically elected and accountable representatives of the people of Colorado, because it does have monetary value, and because it is central to the purpose of the legislation, it is inappropriate for the Supreme Court to unilaterally diminish this entitlement to something unworthy of due process protection under the Fourteenth Amendment.

⁴⁷ *Castle Rock*, 125 S. Ct. at 2806-07. As will be demonstrated below, it is unclear if the Court is holding that no mandatory arrest statute can really be mandatory, or if it is holding merely that this statute's language fails to be clearly mandatory.

⁴⁸ *Id.* at 2807-08. Justices Souter and Breyer, in their concurring opinion, rest on this argument.

⁴⁹ *Id.* at 2808-09.

⁵⁰ *Id.* at 2809-10

1) Duty versus discretion

The first set of arguments by the Court to justify its decision rests on the claim that the purported mandatory arrest statute is not mandatory because it allows for discretion.⁵¹ According to the Court, “Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.”⁵² The Court arrived at its determination that the statute allowed for discretion by ignoring the plain language of the statute,⁵³ and of the restraining order, as well as ignoring the legislative history of the particular statute and similar statutes addressing the same issue.

The circuit court decision was based on both the plain meaning of the statute and of the court order that was issued to Ms. Gonzales because it was “...issued by a court on behalf of a particular person and directed at specific individuals and the police.”⁵⁴ The circuit court pointed to the specific language of the court order in this case:

[y]ou *shall* use every reasonable means to enforce this restraining order." *Id.* It further dictated that an officer *shall* arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of the restrained person when you have information amounting to probable cause that the restrained person has violated or attempted to violate any provision of this order and the restrained person has been properly served with a copy of this order or has received actual notice of the existence of this order.⁵⁵

⁵¹ *Id.* at 2802.

⁵² *Castle Rock*, 125 S. Ct. at 2803 (citing *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 462-63 (1989)).

⁵³ Justice Scalia is known for his textualist approach to interpretation, which in his hands is in keeping with a conservative approach to entitlements. As stated by Bradford C. Mank, “Justice Scalia and other modern textualists often use ‘clear-statement canons’ that require express congressional authorization for a particular type of government regulatory action; this results in narrow constructions of a statute. Clear-statement principles are specific applications of the common law’s traditional presumption in favor of narrowly construing statutes that arguably change the law. Most scholars believe that clear-statement principles generally tend to narrow the scope of statutory language.” *Textualism’s Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 551 (1997-98). As will be demonstrated *infra*, in *Castle Rock* Justice Scalia and the majority avoid the textualist approach here because it would require the recognition of new entitlements.

⁵⁴ *Gonzales*, 366 F.3d at 1104.

⁵⁵ *Id.* at 1103-04.

This mirrors the language of the statute quoted at the beginning of this section. While the repeated use of the word “shall” is not the same word as the word “mandatory,” few words have clearer statutory meaning.⁵⁶ “You shall” means that you are have a duty to do that which follows the verb.⁵⁷ On a plain textualist reading of the statute it is hard to explain what other meaning “shall” could have, given that neighboring provisions use the word “may.”⁵⁸ The majority of the Court reads them to mean the same thing,⁵⁹ but to do so violates a basic canon of statutory construction.⁶⁰ It effectively voids the word “shall” in the text, rendering it superfluous.⁶¹

⁵⁶ “The factor which most heavily weighs in favor of a mandatory construction is the use of the word ‘shall’ in the provision at issue. Unless the context indicates otherwise, the word ‘shall’ generally indicates that the General Assembly intended the provision to be mandatory.” *DiMarco v. Department of Revenue, MVD*, 857 P.2d 1349, 1352 (Colo. Ct. App. 1993) (citing *People v. District Court*, 713 P.2d 918 (Colo. 1986)).

⁵⁷ BLACK'S LAW DICTIONARY (8th ed. 2004), reads:

shall, *vb.* 1. *Has a duty to; more broadly, is required to* <the requester shall send notice> <notice shall be sent>. • This is the mandatory sense that drafters typically intend and that courts typically uphold. 2. *Should (as often interpreted by courts)* <all claimants shall request mediation>. 3. *May* <no person shall enter the building without first signing the roster>. • When a negative word such as *not* or *no* precedes *shall* (as in the example in angle brackets), the word *shall* often means *may*. What is being negated is permission, not a requirement. 4. *Will (as a future-tense verb)* <the corporation shall then have a period of 30 days to object>. 5. *Is entitled to* <the secretary shall be reimbursed for all expenses>. • *Only sense 1 is acceptable under strict standards of drafting.*

(emphasis added).

⁵⁸ For instance, section 18-6-803.5(6)(a) of Colorado Revised Statutes states that “Such peace officer *may* transport, or obtain transportation for, the alleged victim to shelter.” COLO. REV. STAT. ANN. (LEXIS through 2004 Supplement (2004 Sess.)) (emphasis added).

⁵⁹ This immediately brings the question to mind: How does the majority interpret all the “Thou shalt” in the Ten Commandments?

⁶⁰ As the Court stated in *Alaska Department of Environmental Conservation v. E.P.A.*, “It is, moreover, ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” 540 U.S. 461, 489 n.13 (2004) (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))). Colorado Revised Statutes section 2-4-201 (*Intentions in the enactment of statutes*) states, “(1) In enacting a statute, it is presumed that: ... (b) The entire statute is intended to be effective.” COLO. REV. STAT. ANN. (LEXIS through 2004 Supplement (2004 Sess.)).

⁶¹ Although ignored by the Court, Colorado legislation provides guidance as to how its provisions are to be read. Colorado Revised Statutes section 2-4-101 (*Common and technical usage*) reads in part, “Words and phrases shall be read in context and construed according to the rules of grammar and common usage.” COLO. REV. STAT. ANN. (LEXIS through 2004 Supplement (2004 Sess.)). “If the language of a statute is plain and its meaning clear, it must be applied as written.” *Interest of A.R.W.*, 903 P.2d 10, 14 (Colo. Ct. App. 1994) (citing *Heagney v. Schneider*, 677 P.2d 446 (Colo. Ct. App. 1984)).

The Court counters the plain meaning reading with what it refers to as the “well established” tradition of discretion that has coexisted with other mandatory arrest statutes in the past.⁶² The Court’s move is to rely on tradition in this area, or the status quo, and although it appears to cite authority for its view, none of the authority is relevant to mandatory arrest statutes in the specific context of restraining order or protection order violations. The Court refers to both the ABA Standards for Criminal Justice⁶³ and *Chicago v. Morales*⁶⁴ to try to argue that legislative history⁶⁵ and precedent show that there is still discretion under mandatory arrest statutes. Yet the ABA standards are not addressed to the legislative history of this particular statute, nor to any of the other statutes passed to mandate arrest in the restraining order context. Further, the Court in *Morales* found that there was still discretion, because the statute was unconstitutionally vague in specifying the conditions under which an arrest was to be made not because the arrest was mandatory.⁶⁶

⁶² *Castle Rock*, 125 S. Ct. at 2806.

⁶³ Justice Scalia quotes from the commentary to the ABA Standards for Criminal Justice for this view, but the language he quotes does not actually further the view. The reasons he gives for why “mandatory arrest statutes” do not mean “mandatory” include “...legislative history, insufficient resources and sheer impossibility.” 125 S. Ct. 2806 (quoting 1 ABA Standards for Criminal Justice § 1-4.5, commentary, pp. 1-124 to 1-125 (2d ed. 1980) (footnotes omitted)). The problem is that the ABA standards are not referring to mandatory arrest for the violation of restraining orders, so the legislative history is off point and the reasons of “insufficient resources” or “sheer impossibility” do not turn a mandatory requirement into discretionary choice. They may be justifications for why the police are unable to immediately arrest or obtain a warrant, in a given context, but they do not defeat the duty. Colorado Revised Statutes section 2-4-201 (d) (*Intentions in the enactment of statutes*) states, “(1) In enacting a statute, it is presumed that: ... (d) A result feasible of execution is intended.” There is no evidence that it was infeasible or impossible to carry out the duties in this case. COLO. REV. STAT. ANN. (LEXIS through 2004 Supplement (2004 Sess.)).

⁶⁴ 527 U.S. 41 (1999).

⁶⁵ In his scholarly work, Justice Scalia rejects the use of legislative history as a means of determining the meaning of a statute, as he states, “My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute’s meaning.” Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 36 (Amy Gutmann ed. 1996). Justice Scalia further states that “. . . it is simply incompatible with democratic government, or indeed even with fair government, to have the meaning of law determined by what the lawgiver meant, rather than what the lawgiver promulgated.” *Id.* at 17. Is it more democratic to determine the meaning according to what the Court thinks the words mean, rather than their plain meaning?

⁶⁶ *Id.* at 56-59.

The legislative history of the Colorado legislation,⁶⁷ and legislation of its type (i.e., mandatory arrest statutes in the restraining order or protection order context, rather than mandatory arrest statutes generally) do reinforce the “mandatory” reading of the legislation.⁶⁸ The majority of the Court cannot point to any evidence that the drafters of the Colorado statute meant “may” when they used the term “shall.”

Thus, there is evidence at the very beginning of the judgment that the Court is stretching to justify its interpretation of the text in order to deny the right and enforce the duty. The Court stretches further when it turns to *Chicago v. Morales* for the proposition that it is impossible to create a true mandatory arrest statute, for as the Court in *Morales* stated, it is “common sense that all police officers must use some discretion in deciding when and where to enforce city

⁶⁷ Scalia notes that the Court of Appeals quoted a lawmaker's description of how the bill ‘would really attack the domestic violence problems:’

The entire criminal justice system must act in a consistent manner, which does not now occur. The police must make probable cause arrests. The prosecutors must prosecute every case. Judges must apply appropriate sentences, and probation officers must monitor their probationers closely. And the offender needs to be sentenced to offender-specific therapy. The entire system must send the same message . . . [that] violence is criminal. And so we hope that House Bill 1253 starts us down this road. 366 F.3d at 1107 (quoting Tr. of Colorado House Judiciary Hearings on House Bill 1253, Feb. 15, 1994) (emphases omitted).

Castle Rock, 125 S. Ct. at 2805 n.6 (internal quotations omitted). He does not refer to any contrary authority regarding the legislative history of this statute, nor any regarding the host of mandatory arrest statutes in the restraining order or protection order context. Similarly the petitioner could not refer to any evidence of contrary intent with regard to mandatory arrest statutes in the context of restraining orders or protection orders. See Petitioner Br. and Petitioner Reply Br. The Reply Brief, like Justice Scalia’s opinion, addresses other types of mandatory arrest statutes.

⁶⁸ The court in *Nearing v. Weaver*, 670 P.2d. 137 (Or. 1983) addressed the history behind similar Oregon legislation when it stated:

ORS 133.310(3) prescribes that a peace officer "shall arrest and take into custody a person without a warrant" when the officer has probable cause to believe that an order under the statute has been served and filed and that the person has violated the order. The widespread refusal or failure of police officers to remove persons involved in episodes of domestic violence was presented to the legislature as the main reason for tightening the law so as to require enforcement of restraining orders by mandatory arrest and custody.

Nearing, 670 P.2d at 142. The court also noted that, like the provisions of the Colorado statute, “Subsection (3) appears after two subsections that state when an officer "may" arrest a person without a warrant, and the contrasting use of "shall" in subsection (3) is no accident.” *Id.* In light of the public nature of the litigation in *Castle Rock*, it is hard to imagine that the drafters of the Colorado statute were ignorant of how the language they chose would be interpreted by the courts.

ordinances.”⁶⁹ The very next sentence states, “...a true mandate of police action would require some stronger indication from the Colorado Legislature than ‘Shall use every reasonable means to enforce a restraining order’ (or even ‘shall arrest... or seek a warrant’), §§ 18—6—803.5(3)(a), (b).”⁷⁰

If this last sentence is the holding, then clearer language may at least convince some members of the Court that the state in question intended to create a right to mandatory enforcement, but as noted above, it is hard to imagine clearer language. If the prior sentence is the real holding, then no matter how strong the language is, it is not humanly possible to squeeze out all of the discretion. As long as the statute is directed at human beings to carry out a function, there will always be some discretion as to exactly when or how a person will carry out the function.⁷¹ This would defeat almost every entitlement claim that has arisen, be it health care, as pointed out by Justice Stevens,⁷² or any of a number of other entitlements that the courts have found to give rise to due process protection,⁷³ for they all involve some level of discretion in implementation.

⁶⁹ *Castle Rock*, 125 S. Ct. at 2806 (quoting *Morales*, 527 U.S. at 62 n.32) (emphasis in *Castle Rock*).

⁷⁰ *Id.*

⁷¹ This is why it is common for the courts to distinguish between different types of discretion. As the circuit court noted:

In *Allen*, the Supreme Court noted one could use the term "discretion" in two distinct ways. "In one sense of the word, an official has discretion when he or she 'is simply not bound by standards set by the authority in question.'" *Bd. of Pardons v. Allen*, 482 U.S. 369, 375, 107 S. Ct. 2415 (1987) (citing *R. DWORKIN, TAKING RIGHTS SERIOUSLY* 32 (Gerald Duckworth & Co. Ltd. 1996) (1977)). In the alternative, "the term discretion may instead signify that 'an official must use judgment in applying the standards set him [or her] by authority.'" *Id.* (citing *DWORKIN, supra* at 31, 32). See also *Watson v. City of Kansas City*, 857 F.2d 690, 695 (10th Cir.1988).

Gonzales, 366 F.3d at 1105-06. At best the discretion here is in how to carry out the policy or instructions set down for the officer, and not the discretion to ignore the policy or to set new policy.

⁷² *Castle Rock*, 125 S. Ct. at 2820 (Stevens, J., dissenting).

⁷³ *E.g.* *Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972) (continued public employment); *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (free education); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969) (garnished wages); *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (professional licenses); *Bell v. Burson*, 402 U.S. 535 (drivers' licenses), 539 (1971); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (causes of action); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (the receipt of government services, including utility services); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (disability benefits); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (welfare benefits).

Given that a majority of the Court would not be inclined to deny all of these entitlements, then the question shifts back to what kind of discretion is appropriate. This may depend on the nature of the endeavor, for some endeavors require less by way of exercising judgment or discretion. In the case of police enforcement, it would not be wise for the State to require that, no matter what, an officer be required to drop everything immediately and arrest or hunt down and arrest someone for whom there is cause to suspect that a restraining order has been violated. This could lead to absurd results; she or he may be in the middle of trying to arrest someone who is on a shooting spree. Nonetheless, the State may wish to give those within its borders the right to have a court ordered protection order enforced. Thus, it is reasonable that it choose language that is appropriate to the task given the conditions.

The use of “[s]hall use every reasonable means to enforce a restraining order” along with “shall arrest... or seek a warrant,”⁷⁴ as found in the Colorado legislation, appears appropriate to this end. The appropriateness of this language is bolstered by the fact that other states have used similar language in their statutes and courts have found these statutes to give rise to a right or entitlement to enforcement. Justice Stevens, in his dissent, refers to four cases from four different states that have interpreted their mandatory arrest statutes to mean what they say, i.e. that an arrest is mandatory.⁷⁵ The majority largely ignores these decisions and the statutes that

⁷⁴ COLO. REV. STAT. ANN. §§ 18-6-803.5(3)(a), (b) (LEXIS through 2004 Supplement (2004 Sess.)).

⁷⁵ *Nearing v. Weaver*, 670 P.2d 137 (Or. 1983); *Matthews v. Pickett*, 996 S.W.2d 162 (Tenn. 1999); *Campbell v. Campbell*, 682 A.2d 272 (N.J. Super. Ct. App. Div. 1996); *Donaldson v. Seattle*, 831 P.2d 1098 (Wash. Ct. App. 1992). The relevant parts of these decisions relied on, respectively: OR. REV. STAT. § 133.310(3) (1977); TENN. CODE ANN. § 36-3-611 (LEXIS through 2004 Sess.); N.J. STAT. ANN. § 2C:25-31 (LEXIS through the 211th Legis. 2d Ann. Sess. (2005), through P.L. 2005 Ch. 114); WASH. REV. CODE ANN. § 10.31.100 (LEXIS through 2004 Gen. Election (2005 c 2)). Oregon, in 1977, was the first state to enact mandatory arrest laws in domestic violence cases. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 63 (1992). Note that Oregon’s mandatory arrest statute did not immediately result in more arrests by the police. As is pointed out by both Ruth Gundle in *Civil Liability for Police Failure to Arrest: Nearing v. Weaver*, 9 WOMEN’S RTS. L. REP. 259, 262 (1986), and Sue Ellen Schuerman in *Establishing a Tort Duty for Police Failure to Respond to Domestic Violence*, 34 ARIZ. LAW. REV. 355 n.38, n.117, the arrest rates remained low (citing a 1979 study by the Oregon Governor's Commission for Women). This prompted the litigation by the Oregon Coalition Against Domestic and Sexual Violence on behalf of Ms. Nearing in the hopes that a successful tort action would force

they are based on. Justice Stevens mentions them and connects them together with the Colorado statute and a whole wave of statutes throughout the country that were enacted for the purpose of removing or limiting the discretion of the police to enforce protection or restraining orders.⁷⁶ None of the statutes has “more mandatory” language; they all use the similar language of “shall arrest.” A minority of states use the term “may,” and Colorado could have chosen this language had it wished enforcement to be discretionary.⁷⁷

As these cases and legislation demonstrate, it was reasonable for Colorado to adopt the language that it did in order to make enforcement of restraining orders mandatory. In fact, Colorado had the advantage of both the existing Oregon legislation and case law interpreting the language to mean mandatory. The majority does not point to a single case in which the courts have interpreted a statute purporting to mandate arrest for the violation of a restraining order as non-mandatory.

As a final point, the discretion that is allowed by these types of legislation is operational in nature. It involves some amount of discretion as to how to carry out a function or policy. As argued above, this is impossible to avoid. However, this type of discretion is completely different from the type of discretion that is generally referred to in order to immunize the state or defeat claims to relief, namely the discretion to either set, ignore or change the underlying policy in question.⁷⁸

compliance with the law. Gundle, *supra*, at 262; Schuerman, *supra*, at n.117). Schuerman also notes a similar problem in compliance following the enactment of legislation in Minnesota. Schuerman, *supra*, at n.38.

⁷⁶ *Castle Rock*, 125 S. Ct. at 2818 (Stevens, J., dissenting). See *supra* note 18.

⁷⁷ For example, Montana legislation uses “may” and states that “arrest is the preferred response.” MONT. CODE ANN. § 46-6-311 (LEXIS through all 2003 legislation. No legislation enacted in 2004).

⁷⁸ Interpreting similar legislation to that in Colorado, the court held in *Matthews v. Pickett*, 996 S.W.2d 162 (Tenn. 1999), “The record supports a finding that the deputies' failure to arrest Winningham was a deviation from a policy as expressed by statutory mandate and was operational in nature.” *Id.* at 164. It is common for immunity statutes to recognize this distinction, providing immunity for policy decisions, but not for implementation decisions. See 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability* § 78 (2001). Section 78 of volume 57 n.1 states:

Thus, the generally accepted approach to issues of discretion, as well as the plain language, history and purpose of the legislation, all lead to the conclusion in *Castle Rock* that the police did not have the relevant discretion required to defeat an entitlement claim. For the Court to find that the police did have that discretion is to effectively ignore the Colorado's legislation and to find as a matter of constitutional law that the police have discretion to arbitrarily ignore restraining orders.

2) Rights versus procedure

The Court makes a second set of arguments that even if the statute was mandatory it mandates one of two options, arrest or seek an arrest warrant, and since the second option is a procedure, and not an end in itself, this cannot give rise to an entitlement.⁷⁹ This comes close to replicating the duty-discretion distinction above and is questionable on the merits, but even if the argument did have merit it misses the point.

The mere fact that the police have an option does not mean that the police can choose to do nothing. More importantly, under the Colorado statute, the choice between the two options is not discretionary, as the officer is only permitted to seek an arrest warrant if an arrest is impractical.⁸⁰ There was no evidence of such impracticality in the *Castle Rock* case. Thus, it is

[i]n administering the test distinguishing between discretionary acts and ministerial functions, the key factor is the presence of basic policy formulation, planning or policy decisions, which are characterized by an exercise of a high degree of official judgment or discretion, because most states' laws provide for immunity if the government was acting in that manner at the time of the injury.

In fact the distinction goes as far back as *Marbury v. Madison*, in which Justice Marshall distinguished between cases in which an official has political or legal discretion as to what policy to follow or create, and those in which the law assigns a specific duty. 5 U.S. (1 Cranch) 137,163 (1803). In the former case it was held to be clear that the official could only be held accountable to the political process, while in the latter the Court held "...it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of this country for a remedy. *Id.*

⁷⁹ *Castle Rock*, 125 S. Ct. at 2807-08. As noted *supra* note 48, Justices Souter and Breyer, in their concurring opinion, rest on this argument.

⁸⁰ The option is an improvement on those statutes that merely make the arrest mandatory, for if the arrest is impractical it simply will not be done, mandatory language or not. Those statutes that do not fill the gap by requiring that the officer seek an arrest warrant actually provide more discretion to the police officer to do nothing in

beside the point that the second option is no more than an entitlement to a procedure, which the Supreme Court has held is not enough for the attachment of a due process right.⁸¹ Even if it were held to be the case that the second option was merely a procedure, that point could only be reached if the Respondent succeeded on the merits as to the first requirement. This is highly questionable given the facts as alleged. It may be the case that the respondent would prevail on this issue, but that is question of fact which could only be reached by allowing this case to go to the merits stage.

3) Private right versus public purpose

The Court's third set of arguments is that even if the statute mandated a non-discretionary duty on the part of the police, it would still not follow that the intention was to provide the plaintiff a right or entitlement, rather than simply fulfilling a public end, as does much of the criminal law.⁸² At first glance, the Court's third set of arguments appears to be the most compelling. We are very comfortable with the distinction between criminal law and civil law, with the former serving public ends and the latter serving private ends.⁸³ As the majority states, "serving of public rather than private ends is the normal course of the criminal law."⁸⁴ Thus, it is

the face of the impracticality of arrest. Thus, it makes perfect sense to require that the officer seek a warrant as a means of enforcing the order under such circumstances. It gives further clarity and direction to an officer who is to "use every reasonable means to enforce the order."

⁸¹ As the Court stated:

The problem with this is that the seeking of an arrest warrant would be an entitlement to nothing but procedure -- which we have held inadequate even to support standing, see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992); much less can it be the basis for a property interest. See *post*, at 3-4 (SOUTER, J., concurring).

Castle Rock, 125 S. Ct. at 2808 (notes omitted). I have argued that the duty to seek an arrest warrant is not a mere procedure in *Another Case in Lochner's Legacy*. See *supra* note 18.

⁸² *Id.* at 2808-09.

⁸³ Justice Scalia reaches back to the eighteenth and nineteenth centuries to support this view. *Id.* at 2808 (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1769) and *Huntington v. Attrill*, 146 U.S. 657, 668 (1892)).

⁸⁴ *Id.*

plausible to contend that a statute placing duties on the police to enforce the law are designed to serve public ends, rather than private ends.⁸⁵

However, the two are not mutually exclusive. There is no question that the Colorado statute was designed to serve public ends. It does not follow, however, that it was not also designed to serve private ends, or even that it helped to serve the public end by giving a private entitlement.⁸⁶ This is not general legislation calling on the police to carry out their functions generally, but is legislation designed to protect a particular class of vulnerable people. The legislation sought to accomplish the goal by both shifting intervention in this area from mediation and counseling to arrests, and by making enforcement of restraining orders mandatory.⁸⁷ The Colorado legislation came with a wave of similar legislation across the country that was the result of the victims and/or survivors and their advocacy groups pushing for these rights and duties.⁸⁸ They even took part in the drafting, as G. Kristian Miccio points out:

In some jurisdictions, such as Colorado, advocates were approached by key legislators to incorporate mandatory state intervention into arrest provisions. This was the culmination of years of working within the law enforcement establishment as advocates attempted to change police practices through the institution of pro-arrest policies as the preferred course of action.⁸⁹

⁸⁵ Although not recognized by Justice Scalia, his argument is superficially bolstered by Colorado Revised Statutes section 2-4-201(e) (*Intentions in the enactment of statutes*), which states “(1) In enacting a statute, it is presumed that:... (e) Public interest is favored over any private interest.” COLO. REV. STAT. ANN. (LEXIS through 2004 Supplement (2004 Sess.)). This in no way defeats the private interest when it is compatible with the public interest. Further, “Where the meaning is clear and no injustice would result, the statute must be interpreted as written without resort to other rules of statutory construction.” *In Interest of R.C.*, 775 P.2d 27, 29 (Colo. 1989) (citing *People v. District Court*, 713 P.2d 918, 921 (Colo. 1986)).

⁸⁶ Both our common law and statutory law regularly serve public ends by providing private rights of action. Punitive damages is the clearest common law example while the § 1983 legislation provides a right to sue for “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”

⁸⁷ See Wanless, *supra* note 19.

⁸⁸ G. Kristian Miccio traces the histories of both the battered women’s movement, as well as the mandatory arrest movement, in *A House Divided*. *Supra* note 18, at 248-64, 264-82 (2005). See also Wanless, *supra* note 19, at 539-40.

⁸⁹ Miccio, *supra* note 18, at 279 (n.175 omitted) (referring to her interviews with advocates in Colorado in 2003).

Finally, given that advocacy groups were involved in the drafting of the legislation, it is a stretch to think that the drafters of the legislation were not aware of the Oregon legislation and the *Nearing* case holding that its provisions did give rise to an entitlement to enforcement.⁹⁰

4) Still not a property right?

Despite all of the considerations above, the majority of the Court still maintained that, even if this was an entitlement, it was not a property interest under the Fourteenth Amendment Due Process Clause because the Court did not believe it resembled traditional conceptions of property,⁹¹ it does not have monetary value and, according to the Court, “the alleged property interest here arises *incidentally*, not out of some new species of government benefit or service, but out of a function that government actors have always performed -- to wit, arresting people who they have probable cause to believe have committed a criminal offense.”⁹²

This last set of arguments is perhaps the least convincing of all. *Roth* changed the focus from traditional wooden and naive notions of property to a view of property rights and entitlement that looked to the function of property. By looking at the function of property from the past to the present, the Court was able to formulate the rule that, “It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.”⁹³ Entitlements to mandatory arrest for the violation of restraining orders are not novel; they have been around since 1977 – nearly thirty

⁹⁰ The plaintiff in *Nearing* sued under the Oregon Tort Claims Act. As the court held, “If a private defendant would be liable for harm caused by failure to carry out a mandatory duty for the benefit of a specific person protected by a court order,... the Tort Claims Act makes a public defendant liable in the same manner.” *Nearing*, 670 P.2d at 144. As noted, this case was brought under § 1983 based on the alleged due process violation of the state entitlement. It also may have been brought under Colorado state law; Colorado Revised Statutes section 24-10-118 allows for suits against public employees for injuries caused by willful and wanton conduct. COLO. REV. STAT. ANN. (LEXIS through 2004 Supplement (2004 Sess.)). The facts alleged arguably satisfy the requirement.

⁹¹ Scalia acknowledges that this is no bar to the claim. *Castle Rock*, 125 S. Ct. at 2809.

⁹² *Id.* (emphasis in original).

⁹³ *Roth*, 408 U.S. at 577.

years—and the Oregon statute was interpreted to create a new property-like entitlement in 1983, over twenty years ago.

However, what has not been happening “all along” is police enforcement of restraining orders. If the police had in fact been arresting people all along for these violations there would not have been a need for (what is now) a majority of the states in the U.S. to pass legislation mandating arrest for the violation of restraining orders. It is precisely a “new species of government benefit or service” that was created by the legislation, rather than an incidental benefit gained by a general mandate of the police to enforce the law. That benefit was further narrowed to the specific protected person named in the restraining order issued by the court. As Justice Stevens states, “A concern for the “protected person” pervades the statute.”⁹⁴

The assertion that a right to the mandatory enforcement of the restraining order had no monetary value is an odd claim in today’s world, where private security companies, private investigators, and bounty hunters routinely conduct police functions for money.⁹⁵ The argument against Justice Steven’s claim that one could have a contract for such services furthers the point that the order had monetary value, rather than detracting from the point. Justice Scalia, writing for the Court, responded in a note that:

A private person would not have the power to arrest under those circumstances because the crime would not have occurred in his presence. Colo. Rev. Stat. § 16-3-201 (Lexis 1999). And, needless to say, a private person would not have the power to obtain an arrest warrant.⁹⁶

⁹⁴ *Castle Rock*, 125 S. Ct. at 2821 n.15 (Stevens, J., dissenting).

⁹⁵ One wonders if Justice Scalia and the rest of the majority think that the protection given by the U.S. Marshals to members of the judiciary is without monetary value. The U.S. Marshals website boasts that it “coordinated and provided 187 instances of personal protective services to U.S. Supreme Court justices” in 2004. United States Marshals Service, Judicial and Court Security, at <http://www.usmarshals.gov/judicial/> (last visited Aug. 30, 2005).

⁹⁶ *Castle Rock*, 125 S. Ct. at 2809 n.13.

First, a private person would have had the power to arrest since the continued abduction of the children was a continuing breach of the terms of the restraining order.⁹⁷ Secondly, it does not follow that there is no monetary value that can be placed on the enforcement of the order simply because a private person does not have the power to obtain an arrest warrant. It means that the entitlement given is worth more than what one can buy in the market. In the present case, it would not necessarily have been worth much more, since a citizen's arrest could have been made. In those cases in which a citizen's arrest cannot be made, due to the fact that the violation of the order is not ongoing, the warrant is worth considerably more since it puts more resources towards fulfillment of the requirement and substantially increases protection and the likelihood of an arrest. If these services were available in the market, one would pay more for them than what one can currently purchase from the private sector under the law. Thus, the Court's conclusion here appears to be more of a value judgment about what rights one should be able to obtain rather than whether or not the state legislature created those rights.

D. Conclusions regarding Castle Rock

The Court ends its opinion by stating that:

In light of today's decision and that in *DeShaney*, the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its "substantive" manifestations. This result reflects our continuing reluctance to treat the Fourteenth Amendment as "a font of tort law," but it does not mean States are powerless to provide victims with personally enforceable remedies. Although the framers of the Fourteenth Amendment and the Civil Rights Act of 1871, 17 Stat. 13 (the original source of § 1983), did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law.⁹⁸

⁹⁷ The restraining order required that the husband not "molest or disturb" the peace of Ms. Gonzales and the children. *Gonzales*, 366 F.3d at 1144 (Appendix) (O'Brien, J., dissenting).

⁹⁸ *Castle Rock*, 125 S. Ct. at 2810 (citations omitted).

This appears to say that states can only make state enforceable rights of this nature but not property rights or entitlements of this nature that are worthy of Fourteenth Amendment Due Process protection. This runs contrary to both the Fourteenth Amendment and the § 1983 legislation. It is irrelevant that the framers of these two provisions did not “create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented.”⁹⁹ They created a mechanism for holding accountable those acting under color of state authority for the deprivation of a right or privilege, namely, in this context, the right to simple due process. The due process right attaches to the right or entitlement to property.

At the beginning of its opinion the Court stated, “Such entitlements are “of course, . . . not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”¹⁰⁰ Thus, while the majority begins its judgment with the view that it is for states to determine the rights that are to be protected by the Fourteenth Amendment, by the end of the judgment it takes that determination into its own hands and decides that an entitlement to a mandatory arrest is not good enough to be counted as a property right and afforded Fourteenth Amendment protection. The Court has taken it upon itself to decide what the Fourteenth Amendment means by “property” by rewriting a statute designed to make enforcement of restraining orders mandatory for the health and welfare of “protected persons” holding those orders. By writing in “may” to a statute that stated “shall,” the Court has chosen the liberty of police officers to arbitrarily ignore

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 2803 (citations omitted).

their duties to enforce court ordered restraining orders over the safety and security of the victims of domestic violence.

Rather than back up the decision of the Colorado General Assembly to foster the accountability of the police force and to protect some of the most vulnerable members of its society, the Supreme Court has undermined that accountability and protections it could have afforded. It has told these citizens that they do not deserve the even the most modest of all protections, the procedural due process protection against arbitrary governmental conduct.

III. CARMICHELE

A. Introduction

Since the beginning of South Africa's constitutional dispensation there have been a number of cases in which the courts have drawn on the Constitution and its values to inform the development of the common law in order to hold the police accountable for safeguarding the people within its jurisdiction.¹⁰¹ These decisions are part of a shift in values from an

¹⁰¹ *Dersley v. Minister van Veiligheid en Sekuriteit*, 2000 1 ALL SA 484 (T) (Van Dyk, J.) (using the Police Service Act 68 of 1995 and the Constitution as factors in determining that the police owed the plaintiff a legal duty of care in a case involving the negligent misrepresentation by the police that a given car was not a stolen car vehicle, resulting in the plaintiff purchasing the vehicle and the police subsequently confiscating the vehicle from the plaintiff as stolen property); *Van Duivenboden v. Minister of Safety & Sec.*, 2001 4 All SA 127 (C) (Davis, J.) (holding that section 11(1) of the Arms and Ammunition Act 75 of 1969 along with the Constitution placed a duty on the police to institute proceedings in terms of section 11(1) to have an assailant's fire arm license revoked by the police Commissioner, the failure of which resulted in the assailant subsequently using the firearm to kill his wife and one child and to shoot and injure the plaintiff), *aff'd*, *Minister of Safety & Sec. v. Van Duivenboden*, 2002 (6) SA 431 (SCA) (Nugent, J.) (providing a thoughtful and thorough analysis of the impact of the Constitution in cases where the state fails to act); *Van Eeden v. Minister of Safety & Sec. (Women's Legal Centre Trust, as Amicus Curiae)*, 2003 (1) SA 389 (SCA) (holding that the police did have a duty to protect the plaintiff from violent harm and that it violated that duty when it negligently allowed a violent sexual predator to escape from its custody resulting in the rape of the plaintiff at gun point (basing the duty on the constitutionally inspired legal convictions of the community; the right of freedom and security of the person entrenched in section 12(1)(c) of the Constitution, along with section 7(2) of the Constitution, which imposed a duty on the State to "respect, protect, promote and fulfill the Rights in the Bill of Rights;" the section 39(1)(b) provisions which imposed the duty on the State to recognize its obligation under international law to protect women against violent crime and against the gender discrimination inherent in violence against women, as well as section 205(3) of the Constitution and the Police Service Act 68 of 1995 which made it clear that the functions of the police included the maintenance of law and order and the prevention of crime; and finally, the fact that there was no other practical and effective remedy available to the

authoritarian and racist legal system that did not generally attempt to justify its use of force and which was not generally held accountable for that use of force, to a system that fosters a culture of justification, public accountability and transparency.¹⁰² This section and the next address the last two sets of decisions referred to in note 101, namely, those involving Ms. Carmichele and Ms. N.K..

The *Carmichele* decisions are hard to compare with the *Castle Rock* decisions on the level of doctrine, since the two draw from very different constitutional mechanisms. They are similar because in both cases the courts' respective interpretations of their constitutions do have a direct impact on either the creation or extension of a remedy or the retraction of a remedy. In both cases the underlying values or spirit of the constitutions either help forge a special

victim of violent crime)), *rev'g* Van Eeden v. Minister of Safety & Sec., 2001 (4) SA 646 (T) (Swart, J.) (holding that the Constitution was irrelevant to the question as to whether the police owed the plaintiff a legal duty when it negligently allowed a violent sexual predator to escape from its custody and who later raped the plaintiff at gun point); Geldenhuys v. Minister of Safety & Sec., 2002 (4) SA 719 C (Davis, J.) (applying the Constitution to find a duty on the police to keep the plaintiff, who was in police custody when he sustained serious bodily injuries, safe from physical harm and finding that they failed in their duty by failing to timeously and properly investigate the nature and extent of the plaintiff's injuries and to summon assistance); Carmichele v. Minister of Safety & Sec., 2001 (4) SA 938 (CC) (applying the Constitution to find that a legal duty may have existed on the police and prosecutor and that they may have breached that duty when they recommended the release without bail of a Mr. Coetzee without placing before the magistrate any information regarding Coetzee's previous convictions and history of sexual violence where Mr. Coetzee subsequently violently attacked the plaintiff), *remanded to* 2003 (2) SA 656 (C) (Chetty, J.) (finding that the police and prosecution owed the plaintiff a legal duty and had failed in carrying out the duty); N. K. v. Minister of Safety & Sec., CCT 52/04 (CC Jun. 13, 2005) (holding the State vicariously liable for the rape of a stranded women by three on duty uniformed police officers who offered to give her a ride home on the basis of the risk theory and the objective approach to vicarious liability along with the constitutional rights of the victim, the constitutional and statutory duties of the police, and the values of the South African Constitution), *rev'g* K. v. Minister of Safety & Sec., 2005 (3) SA 179 (SCA) (holding the State was not vicariously liable on the basis that the men were on a frolic of their own, based on the interest theory and subjective approach to vicarious liability and on the dubious exclusion of constitutional considerations).

¹⁰² As Etien Mureinik states, the new dispensation is based on "...a culture of justification - a culture in which every exercise of power is expected to be justified." E. Mureinik, *A Bridge to Where: Introducing the Interim Bill of Rights*, 10 S. AFR. J. HUM. RTS. 31, 32 (1994). Mureinik draws from Ronald Dworkin's notion that the overall point of law is to justify state coercion. See RONALD DWORKIN, *LAW'S EMPIRE* 93, 109-10, 127, 190, 400 (1986). These ideals are found in the Final Constitution in section 1(d), and affirmed in section 41(1)(c), which provides, "All Spheres of government and all organs of state within each sphere must -- ... provide effective, transparent accountable and coherent government for the Republic as a whole." They are reiterated in *Rail Commuters Action Group & Others v. Transnet Ltd. t/a Metrorail & Others*, 2005 (2) SA 359 (CC); 2005 (4) BCLR 301, paras. 74-78 (CC). They were also used in *Premier, Western Cape v. Faircape Prop. Developers (Pty) Ltd.*, 2002 (6) SA 180 (C) (Davis, J.) in order to provide a remedy for a property developer for damage caused by a negligent decision of one of the Premier's ministers to grant an application to remove a title deed restriction on Faircape's property. The remedy was based in part on the notion of a culture of justification and the need to hold the government accountable to the people for harm caused by its negligence.

relationship between victims and the police, thereby altering the existing distribution of entitlement and duties, or they hinder those attempts. The one is set on transforming the relationship between the government and its people, by furthering a culture of justification and accountability, while the other is set on conserving the status quo.

In the case of *Carmichele*, the appellant, Ms. Carmichele, was the victim of a vicious attack by Mr. Coetzee in the small, secluded village of Noetzie.¹⁰³ On the day in question, the Ms. Carmichele was visiting an acquaintance's house in which she often stayed.¹⁰⁴ Upon entering the house she was immediately attacked by Mr. Coetzee (he apparently had already broken in).¹⁰⁵ He attacked her with a knife and a pick axe handle, breaking her arm.¹⁰⁶ He dragged her around the house, threatening her, and ordered her to turn around (assumedly to strike her down from behind).¹⁰⁷ When she refused he took out a knife and stabbed her in the breastbone, causing the knife to buckle.¹⁰⁸ When he lunged at her again she managed to kick him and knock him off balance enough to escape through the door and out on to the beach where she found help.¹⁰⁹ Mr. Coetzee was subsequently convicted of housebreaking and attempted murder.¹¹⁰

The crucial facts in the case revolved around the events that took place prior to that day and that allowed for those events to take place. Mr. Coetzee had previously been convicted on charges of indecent assault and was currently standing trial on charges of raping a woman in the

¹⁰³ *Carmichele*, CC, 2001 (4) SA 938 at para 1. See *id.* at paras 5-24 for a full account of the facts in the Constitutional Court judgment.

¹⁰⁴ *Id.* at paras. 21, 23.

¹⁰⁵ *Id.* at para. 23.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at para. 1.

very town in which Ms. Carmichele's attack took place.¹¹¹ He was still in the grips of a suspended sentence on the first conviction and was subsequently convicted of attempted rape on the second.¹¹²

The central issue in the case revolved around the fact that, despite Mr. Coetzee's history of sexual violence, the police and the prosecutor had recommended his release without bail and the prosecutor failed to place before the magistrate any information regarding his previous convictions.¹¹³ He was thus released on his own recognizance and the attack on Ms. Carmichele took place during this time. This was in spite of several interested parties pleading with the prosecuting authorities to retain the perpetrator in custody pending the rape trial, including complaints related specifically to the safety of Ms. Carmichele.¹¹⁴

Ms. Carmichele brought her case in the High Court based on a wrongful omission by the police and prosecutor for failing to protect her from the attack.¹¹⁵ She relied on the obligations imposed on the police by the Interim Constitution¹¹⁶ and on the State under the constitutional rights to life, equality, dignity, freedom and security of the person and privacy.¹¹⁷ The High Court dismissed the claim on the basis that she had failed to establish that the police or prosecutor had wrongfully failed to fulfill a legal duty owed specifically to her.¹¹⁸ On appeal, the Supreme Court of Appeal similarly found "no special relationship" between the applicant and the police or prosecutor which could give rise to a duty to provide her the protection she required,

¹¹¹ *Id.* at paras. 8-9

¹¹² *Id.* at para. 24.

¹¹³ *Id.* at paras. 20, 63, 74.

¹¹⁴ *Id.* at paras. 15-17, 22.

¹¹⁵ *Id.* at para. 2.

¹¹⁶ Act 200 of 1993.

¹¹⁷ *Carmichele, CC*, 2001 (4) SA 938 at para. 27.

¹¹⁸ *Id.* at paras. 2-3 (entering judgment at the end of the plaintiffs case); *see also Carmichele v. Minister of Safety & Sec. & Another*, Case No. 310/98, para. 5 (SCA 2000) [hereinafter *Carmichele, SCA*], *available at*: http://wwwserver.law.wits.ac.za/sca/files/310_98/310_98.pdf (last visited Sept. 1, 2005).

thus finding no grounds for imposing liability.¹¹⁹ The case went to the Constitutional Court as an application for special leave to appeal from the order of the Supreme Court of Appeal on the grounds that that court and the High Court failed to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights as mandated by section 35(3) of the Interim Constitution and section 39(2) of the Final Constitution.¹²⁰

Before addressing the Constitutional Court's decision in this case, it is important to point out exactly what the Court did and did not do. The Court *did*:

- 1) rule that in all cases, the courts in South Africa must promote the spirit, purport, and objects of the Constitution when developing the common law;¹²¹
- 2) require that this take place, starting with the trial court, all the way up through the Supreme Court of Appeal and finally, if appropriate, the Constitutional Court;¹²²
- 3) decide that this particular case was complex enough to warrant a full hearing to determine if a legal duty existed;¹²³ and
- 4) give guidance as to why the claimant's case may have merit given the Constitution.¹²⁴

However, the Court did *not* decide the case on the merits and thus did not decide that a legal duty did in fact exist.

B. Courts must promote the spirit, purport and objects of the Constitution when developing the common law

The first point is important, for since the coming into effect of the Interim and Final Constitutions, the development of the common law of delict has generally been taking place

¹¹⁹ *Carmichele, CC*, 2001 (4) SA 938 at paras 2-3. The appeal was dismissed on exception by the Supreme Court of Appeal. *Id.* at para. 3. See also *Carmichele, SCA*, Case No. 310/98 at paras. 20-21.

¹²⁰ *Carmichele, CC*, 2001 (4) SA 938 at para. 28.

¹²¹ Embodied in section 35 of the Interim Constitution and 39(2) of the Final Constitution.

¹²² *Carmichele, CC*, 2001 (4) SA 938 at paras. 50-55.

¹²³ *Id.* at paras. 80-81.

¹²⁴ *Id.* at paras. 60-74.

without any reference to section 35 of the Interim Constitution or section 39 of the Final Constitution. Both advocates and judges have for the most part not applied their minds to these provisions. It is quite likely that judges have refrained from doing so because advocates have not put such arguments before them. The Constitutional Court recognized that to some extent lawyers may be to blame.¹²⁵ No doubt, for a judge to apply his or her mind to a legal argument not before it cuts against the adversarial tradition of the common law. In light of this tradition, a judge may think it inappropriate or at best discretionary.¹²⁶

This is no longer the case. In paragraph 39 of its judgment, the Constitutional Court stressed that the section 39(2) obligation is not discretionary, as it stated: “it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the Courts are under a general obligation to develop it appropriately.”¹²⁷ Section 39 places the duty on the courts to develop the common law in light of the spirit, purport and objects of the Bill of Rights. It thus places the duty on the courts to raise the issue should counsel not do so.¹²⁸

C. The process of developing the common law in light of the Constitution from the high court upwards is important

The second point is equally important, if not slightly controversial. On one view, it might be thought that the Constitutional Court avoided providing desperately needed justice for the victim. It might be argued that no court is better situated than the Constitutional Court, with its time, resources and expertise, to decide how to best develop the common law in line with the constitutional values. Yet, the Constitutional Court resisted the temptation and referred the case

¹²⁵ *Id.* at paras. 40, 60.

¹²⁶ Note that Justice Scalia justified not certifying the question in *Castle Rock* to the Supreme Court of Colorado on the basis that the parties had not requested it. *See supra* note 40.

¹²⁷ *Id.* at para. 39.

¹²⁸ *Id.*

back to the High Court to attempt the difficult task. The reasons for this are not wholly unpersuasive and revolved around: (1) a judgement about the expertise of the different courts, (2) fairness to potentially losing litigants, and (3) the most appropriate process for arriving at correct legal decisions.¹²⁹ First, the Court argued both that the High Court and the Supreme Court of Appeal were better equipped for the task of developing the common law than the Constitutional Court.¹³⁰ Secondly, it argued that fairness to a potentially losing litigant generally requires that a court not sit as court of first and last instance.¹³¹ Finally, and this point is directly related to the former, if the Constitutional Court decided the matter as a court of first and last instance, it would be denying itself the wisdom of the lower courts as well as the reconsideration and refinement of legal issues and arguments that take place when a case moves its way up to a court of last instance through the process of appeal.¹³²

This contrasts with the U.S Supreme Court's approach in *Castle Rock*, which overturned the circuit court's decision to have the case heard on the merits. If the Supreme Court would have upheld the circuit court's decision, nothing guaranteed that Ms. Gonzales would have been successful, but the facts and case would have been more fully developed leading to a greater chance that a correct decision could have been reached in the case. As noted above, the circuit court and the Supreme Court of Colorado were better placed than the U.S. Supreme Court to make the determination in this case.

D. The case was complex enough to go to be heard on the merits

¹²⁹ These arguments sound remarkably similar to Justice Stevens's arguments in *Castle Rock* for certifying the state law question to the Colorado Supreme Court and for deferring to the decision of the Tenth Circuit. *Castle Rock*, 125 S. Ct. at 2816 n.6 (Stevens, J., dissenting); *see also id.* at 2815-16.

¹³⁰ *Carmichele, CC*, 2001 (4) SA 938 at paras. 41, 50-60.

¹³¹ *Id.* at paras. 51,59.

¹³² *Id.* at paras. 50-52.

The third point is important in this case, for without it the Court would have been required to uphold the decisions of the High Court and the Supreme Court of Appeal and would not have sent the case back down for reconsideration on the merits. In other words, the Court needed to decide that the case was at least complex enough to warrant the view that the common law may be in need of development in this area for it to require that the High Court apply its collective mind to the issue.

The grounds for holding that there may be a prima facie case are based partly on point one above and the fact that the previous courts failed to add the constitutional values into the traditional mix of determining whether a legal duty existed. This is not to say that the test for determining wrongfulness (legal duty) in delict is radically different from the balancing of factors and interests which has traditionally been apart of the test for determining if there is a legal duty, but as the Court states, “that exercise must now be carried out in accordance with the ‘spirit, purport and objects of the Bill of Rights’ and the relevant factors must be weighed in the context of a constitutional state founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values.”¹³³ The point is both that this balancing should include consideration of such sections as those regarding the rights to life, dignity and freedom and security of the person,¹³⁴ and that the South African constitutional provisions point towards a positive duty to prevent harm,¹³⁵ thus distinguishing them from the American negative duty approach and putting them in line with the jurisprudence of the European Court and the European Convention on Human Rights.¹³⁶

¹³³ *Id.* at para. 43.

¹³⁴ *Id.* at para. 44.

¹³⁵ *Id.* at paras. 44-45.

¹³⁶ *Id.* at paras. 45-48.

Such positive duties with regards to the police can be found in both the Interim Constitution, the Final Constitution and in the Police Act.¹³⁷ The Interim Constitution provides in section 215:

- The powers and functions of the Service shall be -
- (1) the prevention of crime;
 - (2) the investigation of any offence or alleged offence;
 - (3) the maintenance of law and order; and
 - (4) the preservation of the internal security of the Republic.

The Final Constitution states in Section 7(2):

“The State must respect, protect, promote and fulfill the rights in the Bill of Rights.”

Section 41 (1) (b) further provides that:

All spheres of government and all organs of State within each sphere must:

- ...
- (2) secure the well-being of the people of the Republic;...

Section 198(a) provides that:

. . . National security must reflect the resolve of South Africans, as individuals and as a nation, . . . to be free from fear

And, section 205(3) reads:

The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

The duties of the South African Police Service are detailed in the South African Police Service Act 68 of 1995. 64 Section 5 reads:

- The functions of the South African Police shall be, inter alia-
- (1) the preservation of the internal security of the Republic;
 - (2) the maintenance of law and order;
 - (3) the investigation of any offence or alleged offence; and
 - (4) the prevention of crime.

Notice, that while there is mandatory language here, there is nothing as specific as the Colorado legislation, which identifies specific duties to a specific class of persons. Nonetheless,

¹³⁷ *Id.* at para. 62.

according to the Court, these duties are accentuated in the case of women, both because of the historically vulnerable place of women within South African society,¹³⁸ and because of South Africa's international obligations under the Convention on the Elimination of all Forms of Discrimination Against Women.¹³⁹ Added to these considerations are the facts of the case relating to the actions of police officer Klein in recommending to the prosecutor that Coetzee be released on warning, as well as failing to provide the prosecutor with all the relevant information that might establish a case against bail.¹⁴⁰ When it came to the potential liability of prosecutors, the Court noted an absence of any duty explicitly laid in the Interim Constitution. Rather it noted a general duty on prosecutors to be found in the common law.¹⁴¹ That duty included putting any information that was relevant to the decision whether to grant or not to grant bail before the Court. The Court further quoted the *United Nations Guidelines on the Role of Prosecutors* to the effect that:

In the performance of their duties, prosecutors shall:

(a) . . .

(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;¹⁴²

The Court then went on to note:

¹³⁸ *Id.*

¹³⁹ *See id.* at n.67. The *Castle Rock* majority opinion by Justice Scalia does not so much as mention, much less respond to, the argument of the amicus brief of International Law Scholars and Women's, Civil Rights and Human Rights Organizations as Amici Curiae in support of Respondents that both the customary international law norms to provide protection and remedies for domestic violence and the obligations of the United States as a party to the International Covenant on Civil and Political Rights should inform the Court's consideration of the due process question. Brief of International Law Scholars and Women's, Civil Rights and Human Rights Organizations As Amici Curiae in Support of Respondents at 1-2, 6-21, 21-29, *Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005) (No. 04-278).

¹⁴⁰ *Carmichele, CC*, 2001 (4) SA 938 at paras. 63-71.

¹⁴¹ *Id.* at para. 72.

¹⁴² *Id.* at para. 74.

That said, each case must ultimately depend on its own facts. There seems to be no reason in principle why a prosecutor who has reliable information, for example, that an accused person is violent, has a grudge against the complainant and has threatened to do violence to her if released on bail should not be held liable for the consequences of a negligent failure to bring such information to the attention of the Court.¹⁴³

The final stumbling block to the claim was one of causation. The Respondent argued that based on the magistrates testimony he would not have held Coetzee in custody even if all the relevant information was put before him.¹⁴⁴ According to the analysis of the Court in paragraphs 75-77, this was not at all clear. It may well have been that the magistrate would not have released Coetzee on bail had all of the relevant evidence been brought before him.¹⁴⁵

The Court concluded that in cases where the facts are complex and the legal position is uncertain it would be better for trial courts not to dismiss cases on exception.¹⁴⁶ The reasons for restraint included making decisions based on a developed record rather than hypothetical facts, which may lead to more certain and final decisions at both the trial court level and appellate level should they make it up on appeal, which in turn may curtail rather than prolong litigation.¹⁴⁷ In the end, the Court was "... satisfied that the case for the appellant ha[d] sufficient merit to require careful consideration to be given to the complex legal issues that it raise[d]." ¹⁴⁸

E. Guidance as to why the claimant's case may have merit given the Constitution.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at para. 75.

¹⁴⁵ *Id.* at paras. 75-77.

¹⁴⁶ *Id.* at para. 80. This again contrasts with the *Castle Rock* decision.

¹⁴⁷ *Id.* at paras. 80-81.

¹⁴⁸ *Id.* at para. 81.

The guidance given by the Court falls short of dictating a final decision in the case. There was much that still required findings on the facts and a delicate balancing of the interests involved. Some of the assistance given has been noted above in terms of the various possible legal sources for finding a legal duty both within and outside the Interim Constitution and the Final Constitution. The Court did attempt to put to rest fears that such decisions may unduly fetter the discretion of public authorities in the carrying out of their duties. This is to be accomplished by a proper application of the balancing of interests inquiry and a concomitant inquiry into the elements of foreseeability, or reasonableness and proximity or remoteness,¹⁴⁹ with due consideration to pressures put upon prosecutors and police in carrying out their duties.¹⁵⁰

In giving guidance, the Court noted that it is unclear how the outlined constitutional duties on the State to respect, protect, promote and fulfil the right in the Bill of Rights (particularly with regard to women) are to be translated into private law duties.¹⁵¹ In any case, the traditional mechanisms for determining when justice and public policy required the development of the common law “...might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.”¹⁵²

While acknowledging that there must be many ways to use section 39(2) in this area of delict,¹⁵³ the Court did suggest the following concrete possibility:

- a) to accentuate the objective nature of unlawfulness as one of the elements of delictual liability, particularly in the context of a bail hearing where the

¹⁴⁹ *Id.* at paras. 49, 57.

¹⁵⁰ *Id.* at para. 73.

¹⁵¹ *Id.* at para. 57.

¹⁵² *Id.* at para. 56 (footnotes omitted).

¹⁵³ *Id.* at para. 58.

roles and general duties of investigating officers and prosecutors are more clearly defined than would normally be the case;

- b) to define it more broadly; and
- c) to allow the elements of fault and remoteness of damage to play the greater role in limiting liability.¹⁵⁴

F. After Remand

When the case came back down to Justice Chetty on remand in *Carmichele v. Minister of Safety & Security*,¹⁵⁵ it was up to him to decide if the omissions by the police and prosecutor were wrongful in light of section 39(2) of the Final Constitution and, if so, whether the wrongful and negligent omission was both the factual and legal cause of the harm to the plaintiff.

Mr. Trengrove, advocate for the plaintiff, argued that the police and prosecutors had failed to act to prevent the attack on Ms. Carmichele on no less than three separate occasions: (1) in March, after Coetzee's arrest for the rape and attempted murder, when it was known by the police and prosecution that he had had a previous conviction for a sexual offence;¹⁵⁶ (2) in April, after the prosecutor had interviewed Coetzee, after his attempted suicide, and after his return from a psychiatric evaluation in which it was determined that he was fit to stand trial and that he had the ability to appreciate the wrongfulness of his acts;¹⁵⁷ and (3) in June, after the owner of the house in which the attack on Ms. Carmichele took place had reported that Coetzee had been snooping around her house and had attempted to break in.¹⁵⁸

During the course of the trial, the primary police investigator, Klein, was found to have fabricated a set of false justifications for his failure to oppose the release of Coetzee after his

¹⁵⁴ *Id.* at para. 57.

¹⁵⁵ 2003 (2) SA 656 (C)

¹⁵⁶ *Id.* at para. 7.

¹⁵⁷ *Id.* at para. 24.

¹⁵⁸ *Id.* at para. 25.

arrest for rape and attempted murder of a Ms. Eurona in March.¹⁵⁹ Unfortunately, both Klein's supervisor, Hugo, and the prosecutor, Louw, simply acquiesced in his decision not to oppose bail, because of their esteem for Klein (or so they claimed).¹⁶⁰ What was important was that both Hugo and Louw conceded under cross examination that had they applied their minds, they would not have acquiesced in Klein's decision.¹⁶¹ Louw also conceded that she was in error in agreeing to his release in April after his psychiatric exam,¹⁶² and in not assuring that he was arrested after the trespass and attempted break-in in June.¹⁶³

Counsel for the State attempted to argue that it was questionable whether propensity to commit a crime was a relevant factor in opposing bail or whether the main consideration was if the accused would appear for his trial.¹⁶⁴ There was also an attempt to argue that the provisions of the Interim Constitution that provided that an accused had a right to bail "unless the interest of justice determined otherwise" made it reasonable for the police and prosecution to err on the side of bail or freedom.¹⁶⁵

Justice Chetty did not accept either argument, as it was clear to him that it must have been apparent to the police and prosecution that Coetzee either could not or would not control his sexual aggression,¹⁶⁶ and that even if it was generally safe to err on the side of freedom, given the facts of this case, they should have opposed bail.¹⁶⁷ In fact, both Louw and Hugo conceded

¹⁵⁹ *Id.* at para. 16.

¹⁶⁰ *Id.* at paras. 11, 12, 19.

¹⁶¹ *Id.* at paras. 23, 26.

¹⁶² *Id.* at para. 24.

¹⁶³ *Id.* at para. 25.

¹⁶⁴ *Id.* at para. 21.

¹⁶⁵ *Id.* at para. 22.

¹⁶⁶ *Id.* at para. 21.

¹⁶⁷ *Id.* at para. 22.

that their decisions not to oppose bail were inconsistent with the guidelines circulated by the Attorney General and the South African Police Service under the Interim Constitution.¹⁶⁸

Justice Chetty maintained that under the pre-constitutional common law there would have been no legal duty on the police or the prosecutor vis-a-vis the plaintiff.¹⁶⁹ Although it was not said, presumably this would have been so because the relationship between the plaintiff and the defendants was not sufficiently “special” for there to be a legal duty towards her (as was held in the case before the Supreme Court of Appeal). As questionable as this may be, both in terms of the legal requirement and the satisfaction of the legal requirement given the above facts, the introduction of the Constitution changed the legal analysis.

Turning to the inquiry under section 39(2) of the Final Constitution, Justice Chetty followed the Constitutional Court’s two stage analysis, first determining if the common law was in need of development under section 39(2), and, if it was in need of development, then determining how to make that development.¹⁷⁰ Counsel’s arguments that there was no need for the development given the amendments to the bail provisions in the Criminal Procedure Act 51 of 1977 were not taken very seriously by the Court.¹⁷¹ As Justice Chetty stated, “the question that arises for decision is whether, at the time the plaintiff suffered her loss, the relevant authorities discharged their constitutional duty.”¹⁷²

Justice Chetty found the constitutional duty “enshrined in sections 10, 11 and 12 of the Constitution, which entrench the right to dignity, life, and freedom and the security of all

¹⁶⁸ *Id.* at para. 26.

¹⁶⁹ *Id.* at para. 27.

¹⁷⁰ *Id.* at para. 28.

¹⁷¹ *Id.* at para. 29.

¹⁷² *Id.*

person,”¹⁷³ along with section 7(2) which imposes a duty on the State to respect, protect, promote and fulfill the rights in the Constitution.¹⁷⁴

Justice Chetty followed the Constitutional Court’s guidance in noting that it is the police and prosecutor who are the primary agencies for protecting not only the public in general, but women in particular, against violent crime.¹⁷⁵ Following the Constitutional Court’s dicta, Justice Chetty held:

that prosecutors are obliged, in the performance of their duties, to ‘protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances irrespective of whether they are to the advantage or disadvantage of the suspect’[and that in the context of a bail hearing, they have a duty] “to place before the court any information relevant to the exercise of the discretion with regard to the granting or refusal of bail, and, if granted, any appropriate conditions attaching thereto.”¹⁷⁶

With this in mind, and following the submission by Mr. Trengrove for the plaintiff, Justice Chetty revisited the conventional test for wrongfulness and held that “[r]easonableness, on which the legal convictions of the community are based, is now to be found in the Constitution and not in some vague notion of public sentiment or opinion.”¹⁷⁷ He then went on to quote supportive language from the decision of Justice Davis in *Van Duivenboden v. Minister of Safety & Security*¹⁷⁸ to the effect that the Constitution and South African society are founded on the values of dignity, liberty and equality and “the added principle that public authority must be transparent and accountable to the public it serves.”¹⁷⁹

On the issue of wrongfulness, the Court concluded that “the enquiry whether the State owed the public in general, and women in particular, a duty at private law to exercise reasonable

¹⁷³ *Id.* at para. 30.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at para. 31.

¹⁷⁸ 2001 4 B All SA 127 (C).

¹⁷⁹ 2003 (2) SA 656 (C) at para. 31 (quoting *Van Duivenboden*, 2001 4 B All SA 127 at 132d).

care in the prevention of violent crime, the proper application of the test requires one to attach primary significance to these constitutional imperatives.”¹⁸⁰ Given the above facts, the imperatives noted above, and the lack of a public law remedy, the Court held that Klein, Hugo and Louw owed the plaintiff a delictually cognizable legal duty to protect her against the risk of sexual violence perpetrated by Coetzee.¹⁸¹

In response to worries of the opening of the floodgates of litigation, Justice Chetty was careful to limit his decision to the facts of this case, noting that the standard is simply to act with the care and diligence of the ordinary police person and prosecutor.¹⁸² There was little question as to their negligent failure to live up to the duties imposed given the facts of the case. However, there still remained the question of whether their failure was the factual and legal cause of the harm done to the plaintiff.

It is worth noting that Justice Chetty made no reference to the factor of a “special relationship” between the plaintiff and the defendants, a factor that was elevated to the level of a requirement by the Supreme Court of Appeal in its decision. Although he mentioned the duty of the police and prosecutor to women “in particular,”¹⁸³ his decision does not seem to rest on the special vulnerability of women in South African society, nor on any special duty to protect women under South Africa’s international obligations. Thus, his decision may be broader than the obiter dicta of the Constitutional Court, which put considerable emphasis on the vulnerable position of women in South Africa, their continued subordination through sexual violence, and on South Africa’s international duties under the Convention on the Elimination of all Forms of

¹⁸⁰ *Id.* at para. 32.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

Discrimination Against Women to prevent the violation of women's rights and their subordination.¹⁸⁴

It is worth noting that one may argue that under the Final Constitution no "special relationship" is required, or that the Constitution itself embodies the "special relationship" that is required. That special relationship is embodied in the new covenant between the whole of the population of South Africa and its government, as well as between each other. It may be argued that the constitutional regime is based on a new and different kind of society -- one that no longer accepts a mere minimal *laissez faire* state where, at best, one has negative rights to be left to one's own devices, but rather, one in which the people can legitimately expect more from each other and more from the state by way of positive duties.¹⁸⁵

On the issue of causation, Justice Chetty noted that there are two components to causation, factual and legal.¹⁸⁶ There would be little difficulty showing factual causation based on an objective approach to what a reasonable magistrate would have done if Klien, Hugo and Louw performed their duties.¹⁸⁷ Although Justice Chetty noted the broad based policy inquiry for legal causation in South Africa,¹⁸⁸ he did not conduct the inquiry, but simply stated that he was "...satisfied that there was a sufficiently close nexus between the omissions and the harm occasioned to the plaintiff."¹⁸⁹ If this lacuna was an error, the error was harmless, for the policy

¹⁸⁴ *Carmichele*, CC, 2001 (4) SA 938 at para. 62.

¹⁸⁵ This is particularly apropos when it comes to the duties of the police and prosecuting authorities to keep the people of South Africa safe.

¹⁸⁶ *Carmichele*, SCA, Case No. 310/98 at para. 33.

¹⁸⁷ *Id.* at paras. 34-35, 37. Justice Chetty noted that one could take either an objective or a subjective approach to the question but that the subjective approach (what the actual magistrate would have done) was not in the interest of the administration of justice, and was not supported by the Constitutional Court. *Id.* at paras. 35-37.

¹⁸⁸ Justice Chetty followed the now classic decision of *International Shipping Co. (Pty) Ltd. v. Bentley*, 1990 (1) SA 680 (Corbett, J.A.) (referring, at 701B – C, to *Fleming The Law of Torts* 7th ed. at 173 and writing, "This enquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default.") *Id.* at para. 38.

¹⁸⁹ *Id.*

analysis would simply be a repetition of the analysis that he conducted when determining the issue of wrongfulness/ legal duty above.

I.V. N.K.

One of the many tragedies of apartheid was not merely a breakdown in the rule of law but the breakdown of confidence in those enforcing the law. The injustices of apartheid law were often amplified by enforcement that was arbitrary, cruel and corrupt with little regard for human rights or due process.¹⁹⁰ At the end of Apartheid, there was an extreme lack of confidence in the police. As Mark Malan notes, “Obviously, the majority population did not hold the SAP or its offshoots in high regard. In fact, by the time that the political transition to democracy began in 1990, the SAP had become ‘...an inefficient and ineffective police force, which had lost the confidence of the South African public.’”¹⁹¹

One would have hoped that with the end of apartheid, and the beginning of the ‘new South Africa’ that the police services would rise to the call to serve and protect. Unfortunately, as the facts of the NK case illustrate, all too often, they have not.¹⁹² The essential facts of the case are simple, yet disheartening. The applicant in the case was stranded in the early hours of the morning and was in need of a ride home.¹⁹³ The applicant accepted a ride from three uniformed on duty police officers who, instead of assisting her and protecting her, raped her and

¹⁹⁰ Janine Rauch, *Police Reform and South Africa’s Transition*, at 1, available at <http://www.csvr.org.za/papers/papsaiia.htm> at 1 (last visited, Sept. 5, 2005).

¹⁹¹ Mark Malan, *Police reform in South Africa: Peacebuilding without peacekeepers*, INSTITUTE FOR SECURITY STUDIES (quoting K Biddle, I Clegg & J Whetton, *Evaluation of ODA/DFID support to the police in developing countries: Synthesis study*, draft report, University of Wales, October 1998). (in 8 AFRICAN SECURITY REVIEW (1999), available at <http://www.iss.co.za/Pubs/ASR/8No3/PoliceReform.html> The INSTITUTE FOR SECURITY STUDIES, *Victim Surveys 1997/8* in Johannesburg, Durban, Cape Town and Pretoria have found a generally poor public image of the police held by victim and perpetrator alike (Janine Rauch, *Police Reform and South Africa’s Transition*, at n. 18, available at <http://www.csvr.org.za/papers/papsaiia.htm> (last visited, Sept.5, 2005).

¹⁹² N.K., CCT 52/04.

¹⁹³ *Id.* at paras. 1, 3.

beat her before throwing her into some bushes close to her home.¹⁹⁴ The three officers were convicted and given life sentences for the rape and 10 year sentences for the kidnapping.¹⁹⁵ Ms. N K originally brought her claim against all three assailants as well as the Minister of Safety and Security but decided to abandon the claim against the three assailants.¹⁹⁶ Both the High Court and the Supreme Court of Appeal had dismissed the case on the grounds that the respondent was not vicariously liable for the actions of the police officers.¹⁹⁷ These decisions were unanimously overruled by the Constitutional Court in an opinion handed down by O'Regan J in *N K v Minister of Safety and Security*.

The constitutionally inspired approach to vicarious liability by Justice O'Regan in *N.K. v. Minister of Safety & Security* has resulted in the adoption of the risk theory of vicarious liability over the traditional interest theory of vicarious liability. The courts in South Africa have gone back and forth between a narrow or conservative view of “scope of employment” and a broad or liberal view of “scope of employment” in frolic cases.¹⁹⁸ The narrow view is often associated with the interest theory, which limits the liability of an employer for the conduct of its employees to that which further the interests of the employer. This is the more libertarian view; and from this view, vicarious liability is an exception to the general rule that one is to look out for her or him self and no one else. The Supreme Court of Appeal in *K. v. Minister of Safety & Security* briefly captured the policy considerations behind the rule as:

...serving to maintain a balance between imputing liability without fault (which runs counter to general legal principles) and the need to make amends to an injured person who might otherwise not be recompensed. From the innocent

¹⁹⁴ *Id.* at paras. 1-6.

¹⁹⁵ *Id.* at para. 6.

¹⁹⁶ *Id.* at para. 8.

¹⁹⁷ *Id.* at paras. 1, 8 and 9.

¹⁹⁸ South African courts have continued to shift between a conservative and expansive approach to frolic cases. The Supreme Court of Appeal itself has swung back and forth on the issue. The unprincipled approach to this area of the law by the Supreme Court of Appeal was criticized by this author in *Law of Delict, in 2000 ANNUAL SURVEY OF SOUTH AFRICAN LAW* 328; and *Law of Delict, in 2001 ANNUAL SURVEY OF SOUTH AFRICAN LAW* 356.

employer's point of view, the greater the deviation the less justification there can be for holding him or her liable.¹⁹⁹

Employers, be they private or public, are not their brothers' keepers and the only way to justify holding them accountable for the actions of their brothers or sisters is if their brother or sister is going about his or her employer's business and furthering her, his, or its interests.²⁰⁰ The Supreme Court of Appeal adopted this view when it held that the State was not vicariously liable for the rape of the plaintiff.

In contrast, the worldview that underlies the risk theory of vicarious liability sees the person as a cooperating member of the community, who not only competes for whatever she or he can take from the community, but who is nurtured by that community and who has duties to the members of that community. Those duties include being responsible for the dangers and risks that they impose on the community and paying for the harm that is caused by the increased risks that they impose.²⁰¹

In her opinion, Justice O'Regan drew heavily from the Court in *Carmichele* for a number of constitutional values that are relevant to the present case.²⁰² Those values are in part found in provisions of the Constitution and The South African Police Service Act, which not only give women like Ms. N.K. rights, but also impose duties on the State. These rights and duties include the rights to security of the person, dignity, privacy and substantive equality, as well as the duties

¹⁹⁹ The Supreme Court of Appeal in *K. v. Minister of Safety & Security* briefly captured the policy considerations behind the rule as "serving to maintain a balance between imputing liability without fault (which runs counter to general legal principles) and the need to make amends to an injured person who might otherwise not be recompensed. From the innocent employer's point of view, the greater the deviation the less justification there can be for holding him or her liable." *K.*, 2005 (3) SA 179, para. 4 n.181 (SCA).

²⁰⁰ These values support what Neethling et al refer to as the interest or profit theory of strict liability. NEETHLING ET AL., *LAW OF DELICT* 338, 348 (J.C. Knoble trans. & ed., 4th ed. 2001)

²⁰¹ This underlies the risk theory of vicarious liability. See NEETHLING ET AL, *supra* note 192, at 364, 374.

²⁰² *N.K.*, CCT 52/04 at para. 18. The Supreme Court of Appeal distinguished the impact of such cases as *Carmichele*, CC, 2001 (4) SA 938 (CC), on the basis that those cases dealt with the issue of wrongfulness, with the implication that the section 39(2) mandate only applied to the issue of wrongfulness or lawfulness. *Id.* at para. 8. Justice O'Regan rejected this limitation on the reach of the Constitution into the law of delict. *Id.* at para. 19.

found in section 205 of the Constitution and the Preamble of The South African Police Service Act.²⁰³ Justice O'Regan, quoting *Carmichele* at length, emphasized the importance of being free from sexual violence as a prerequisite for equality and self determination, and of the responsibilities of the police to protect women from such violence.²⁰⁴ She identified the policy reasons for the rule as affording claimants efficacious remedies, inciting employers to take active steps to prevent their employees from causing harm to the public, as well as holding employers liable only when it is fair to do so.²⁰⁵

There are other reasons for vicarious liability not mentioned by Justice O'Regan, including the balancing of equities between a victim and an employer who:

1. either generally or specifically profits from the deeds of her or his employees,²⁰⁶ and/or
- or
2. who creates greater risks to the public through her or his employees,²⁰⁷
3. who provides the opportunity and/or tools to her or his employees who cause

²⁰³ *Id.* at para. 18.

²⁰⁴ In fact, sexual violence was recorded as being the greatest single threat to the self determination of South African women. *Id.* (quoting *Carmichele*, CC, 2001 (4) SA 938 at para. 62).

²⁰⁵ *Id.* at para. 21.

²⁰⁶ See, e.g. DOBBS, *supra* note 24, at 910.

²⁰⁷ Neethling et al see this as the better justification for strict liability. *Supra* note 192, at 364, 374. I don't see any reason why the different reasons cannot be combined. See *Minister of Police v. Rabie*, which comes close to elevating the risk theory to the rule in the case and thereby supplanting the need for a 'within the scope of one's duty test.' 1986 1 SA 117 (AD) at 134-35. But see *Minister of Law & Order v. Ngobo*, 1992 (4) SA 822 (A) (clarifying that the risk justification for the rule is not the same as the rule); see also *Ess Kay Electronics Pte Ltd. & Another v. First Bank of S. Afr. Ltd.*, 2001 (1) SA 1214, para. 10 (SCA) (refusing to follow the *Rabie* test, arguing that "what seems to require continual emphasis, therefore, is that the rule and the reason for its existence must not be confused. The risk referred to, and considerations of public policy, have to do with the reason for the rule. They are not elements of the rule and they do not inform its content."). However, it does not follow that the above two-part test set out in *Rabie* was incorrect. See *N.K.*, CCT 52/04 at para. 31 n.39. It further does not follow that the reasons for the rule 'do not inform its content.' The Court put it so:

what seems to require continual emphasis, therefore, is that the rule and the reason for its existence must not be confused. The risk referred to, and considerations of public policy, have to do with the reason for the rule. They are not elements of the rule and they do not inform its content.

Ess Kay, 2001 (1) SA 1214 at para. 10. "If risk to the public is one of the underlying rationales for imposing vicarious liability then it follows that, all things being equal, the more risk an employer places on the public the more reason for imposing liability. Even the Court in *Ngobo* recognized it as one of the factors to be taken into consideration (*Ngobo* at 828-834)." Christopher J. Roederer, *Law of Delict*, in 2001 ANNUAL SURVEY OF SOUTH AFRICAN LAW 348.

harm,²⁰⁸ and

4. who is in a better place to not only bear and spread the cost of the harm,²⁰⁹
5. but who also is in a better place to deter the harmful conduct that takes place.²¹⁰

These are the typical justifications found in common law jurisdictions and they combine notions of corrective justice, economic efficiency, and deterrence to outweigh the ‘normal rule’ that one is not responsible for the delicts or torts of others, but only responsible for her or his own delicts or torts. Further justifications or principles that might justify the imposition of vicarious liability in the context of post-apartheid South Africa include such ideals as public accountability,²¹¹ non-delegable duties,²¹² human rights, *ubuntu*,²¹³ and the overall transformation of South African law and society from one that is founded on the *laissez faire* values of freedom and autonomy to one

²⁰⁸ This is a subcategory of the risk theory. For the view under U.S. law see, e.g. *Restatement Second of Agency* § 219(2)(d); DOBBS, *supra* note 24, at 910, 914 (referring to the case of *Costos v. Coconut Island Corp.*, 137 F.3d 46 (1st Cir. 1998) (holding the owners of an inn vicariously liable for the rape of a tenant by its employee based on the view that the employment made the tort possible and/or aided in the accomplishment of the tort)).

²⁰⁹ See, e.g., George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 LEGAL STUD. 447, 461 (1985).

²¹⁰ See, e.g. Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984). This principle is broader than “control,” particularly when an employer has a range of devices available to her to deter harmful conduct, including, training, supervision and other mechanisms or procedures to encourage safety and to curb harmful conduct. The point is that an employer is often better placed than the employee him or her self to deter or limit harmful conduct. Sykes’s and Richard Epstein’s work combine points four and five above with arguments about the cost of identifying and suing employee plaintiffs, cheaper insurance under vicarious liability and overall security against harm. RICHARD EPSTEIN, TORTS 240-41 (1999).

²¹¹ Justice O’Regan discusses this value in the context of identifying the issue as a legal issue rather than merely a factual issue but does not address it in the context of the holding the State vicariously liable. In critiquing *Mkhatswa v. Minister of Defence*, 2000 (1) SA 1104 (SCA) (where the Court found the State was not vicariously liable for the actions of its employees when one of its employees left the base with an unauthorized vehicle and an indeterminate number of rifles that were in the possession and control of on duty sentries in order to exact revenge on innocent victims), this author argued that the decision “[could] not be in keeping with any notion of government accountability. ... This would provide little incentive for the Minister to impose discipline in the ranks, thus leading to less and less accountability. This cannot be in keeping with the spirit of the Bills of Rights.” Christopher J. Roederer, *Law of Delict*, in 2000 ANNUAL SURVEY OF SOUTH AFRICAN LAW.

²¹² For U.S. authority, see *Stropes v. Heritage House Childrens Ct*, 547 N.E.2d 244 (Ind. 1989).

²¹³ As Marius Pieterse writes, “The Nguni word *ubuntu* represents notions of universal human interdependence, solidarity and communalism which can be traced to small-scale communities in pre-colonial Africa, and which underlie virtually every indigenous African culture.” M. Pieterse, “Traditional” African Jurisprudence, in JURISPRUDENCE 441 (Christopher J. Roederer & D. Moellndorf eds., 2004). Justice O’Regan draws on the fact that vicarious liability is a common feature of traditional society in South Africa. She notes that the Kraalhead is liable for all the delictual acts of inhabitants of the Kraal. *N.K.*, CCT 52/04 at para. 24 n.30.

founded on equality, dignity, freedom, mutual respect, and caring cooperation in the achievement of self determination for all South Africans.²¹⁴

In conclusion, Justice O'Regan held that the opportunity to commit the crime arose because of the trust put in the policemen, a trust that was constitutionally mandated, and the breach of that trust constituted a breach of their duties and an infringement of her rights to dignity and security of the person.²¹⁵ The delict was held to be intimately connected with the purpose of the employer rendering the State vicariously liable.²¹⁶

V. CONCLUSION

As noted above, the South African approach to these cases is hard to compare to the *Castle Rock* cases, or at least to the U.S. Supreme Court decision. They appear a world apart. For one, the status quo baseline is the neutral, natural distribution of entitlements.²¹⁷ While for the other, the status quo was a hold over from the authoritarian apartheid regime, which was racist, sexist and often unaccountable for what it did. While the one court struggles to hold back change, the other struggles towards change. As the late Justice Mahomed stated in *S. v. Makwanyane*, “The South African Constitution is different: it retains from the past only what is defensible and represents a

²¹⁴ See section 1 of the Final Constitution as well as Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146 (1998); S. Woolman & D. Davis, *The Last Laugh: Du Plessis v De Klerk, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights Under the Interim and Final Constitutions*, 12 S. AFR. J. HUM. RTS. 36 (1996); H. Corder, *Prisoner, Partisan and Patriarch: Transforming the Law in South Africa 1985-2000*, 118 S. AFR. L.J. 772 (2001); A. Chaskalson, *The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order*, 16 S. AFR. J. HUM. RTS. 193 (2000); D. Moseneke, *The Fourth Bram Fischer Lecture: Transformative Adjudication*, 18 S. AFR. J. HUM. RTS. 309 (2002); Christopher J. Roederer, *Post-matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law*, 19 S. AFR. J. HUM. RTS. 57 (2003). Respect for the rule of law is fostered by holding the guardians of the law responsible for the violations of the law by their employees. *N.K.*, CCT 52/04 at para. 52.

²¹⁵ *N.K.*, CCT 52/04 at para. 57.

²¹⁶ *Id.*

²¹⁷ As Cass Sunstein states, “...the status quo—what people currently have—is often treated as the neutral and just foundation for decision. Departures from the status quo signal partisanship; respect for the status quo signals neutrality. When the status quo is neither neutral nor just, reasoning of this kind produces injustice” CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* v (1993).

decisive break from and ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive.”²¹⁸

The legislature in Colorado attempted to apply this standard when drafting the legislation addressed in *Castle Rock* by rejecting the history of violence against women and children, and rejecting the history of police indifference to their plight. It attempted a decisive break with that past in order to provide victims an entitlement and to hold the police accountable. While the Court would never come out and endorse this past, which Colorado attempted to reject,²¹⁹ it has at least in part, forced the people of Colorado to retain and live with that part of its past. It has denied them the most basic of all protections afforded to those living within the borders of this country, the right of procedural due process.

²¹⁸ 1995 (3) SA 39, para. 262 (CC).

²¹⁹ Remember that Justice Scalia opens his opinion by recounting how horrible the facts are. 125 S. Ct. 2796, 2802. Justice Scott for the Supreme Court of Appeal in *K.* also had sympathy for the plaintiff that he and his court denied relief, as he stated, “I have the deepest sympathy for the appellant, as I do for the thousands of women who are raped every year in this country. Ideally, they should all receive compensation, but that is something for the Legislature and beyond the jurisdiction of this court.” *K.*, 2005 (3) SA 179, para. 10 (SCA).